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In the
Supreme Court of the United States

OCTOBER TERM, 1990

WESTVACO COMPANY, RICHARD LAFFARGUE
AND LORENZO SANCHEZ,
PETITIONERS,

v.

DOLORES SWEENEY,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is preemption of state law tort claims under section 301 of the Labor Management Relations Act, 29 U.S.C. §185, an issue of subject matter jurisdiction that can be raised at any time?

2. Alternatively, is preemption of state law tort claims under section 301 of the Labor Management Relations Act, 29 U.S.C. §185, an issue not subject to the usual rules of issue preservation because of the compelling national policy that uniform federal law must be applied in the interpretation of collective bargaining agreements?

LIST OF PARTIES

The petitioners, Westvaco Corporation, Richard Laffargue, and Lorenzo Sanchez, were defendants and appellees in the proceedings below. The respondent, Dolores Sweeney, was the plaintiff and appellant in the proceedings below.

RULE 29.1 LIST

Pursuant to Supreme Court Rule 29.1, listed below are all non-wholly owned subsidiaries and affiliates of Westvaco Corporation:

Clupak, Inc.

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IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1990

WESTVACO COMPANY, ET AL.,
PETITIONERS

v.

DOLORES SWEENEY,
RESPONDENT

Petitioners Westvaco Corporation, Richard Laffargue, and Lorenzo Sanchez respectfully pray that a writ of certiorari issue to review the judgment and opinion entered in this case by the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 926 F.2d 29 and is reprinted in Appendix A to this Petition.

The decision of the United States District Court for the District of Massachusetts (Ponsor, U.S.M.) has not been reported. It is reprinted in Appendix B to this Petition.

JURISDICTION

The decision of the Court of Appeals issued on February 12, 1991. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), which provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction of the parties,

without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The Facts

George Sweeney, the husband of respondent Dolores Sweeney, was for many years an hourly union employee at the Enfield, Connecticut, envelope manufacturing plant of Westvaco Corporation. In 1982, Westvaco's management and United Paperworkers International Union AFL-CIO/CLC negotiated a revised collective bargaining agreement (the "Agreement") governing seven of the ten Westvaco envelope manufacturing plants, located in six states, including the Enfield plant where George Sweeney worked. The Agreement contains, inter alia, detailed provisions for resolving disputes by

grievance and arbitration, including a provision that the results of arbitration "shall be final and binding . . . ." App. B at 9b.

The Agreement also contained a change in Westvaco's overtime policy. Under the previous agreement, Westvaco employees had been free to accept or decline overtime at will. Under the terms of the 1982 Agreement, however, Westvaco could require employees to work at least four hours of overtime each workweek. The Agreement imposed a system of progressive sanctions on employees who refused mandatory overtime.

In December, 1983, George Sweeney declined to work mandatory overtime. As prescribed by the progressive discipline provisions of the Agreement, Mr. Sweeney's supervisors issued a warning to

him for his refusal to accept the required overtime. Mr. Sweeney testified that his emotional distress, upon which this entire lawsuit is based, began as soon as he received the warning for refusing to work the mandatory overtime. App. B at 4b.

Over the course of the ten months after December, 1983, there was a series of incidents between Mr. Sweeney and his supervisors that added to his emotional distress. For example, Mr. Sweeney testified that the plant managers told him that they would refuse to accept a doctor's certificate attesting to medical conditions that should excuse him from working overtime, despite explicit provisions under the Agreement for submission of medical excuses. Mr. Sweeney testified that he was humiliated

by a request by a Westvaco safety official to demonstrate the particular aspects of his job that were made difficult by his medical condition. Mr. Sweeney also testified that his supervisors subjected him to unreasonable pressure to increase productivity. App. B at 3b-7b.

The events culminated in October, 1984, when the plant supervisors informed Mr. Sweeney that he was being transferred to a new job in the plant. After being informed of this decision, Mr. Sweeney suffered an emotional collapse from which he had not fully recovered by the time of trial. He had not returned to work, either at the Enfield plant or elsewhere, since suffering his breakdown. App. B at 8b-9b.

As noted above, the Agreement between Westvaco and the union contained detailed provisions for resolving labor-management disputes by grievance and arbitration. Although each of the incidents summarized above was grievable under the Agreement, it is undisputed that Mr. Sweeney never filed a grievance in this matter, nor did local union officials file a grievance on his behalf. Instead, respondent Dolores Sweeney brought a state tort action against Westvaco in the Massachusetts Superior Court, Hampden County, claiming loss of consortium based on intentional and negligent infliction of emotional distress on her husband.[1] App. B at 9b-11b.

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[1] Any state tort action by Mr. Sweeney himself was precluded by the Massachusetts Workers' Compensation statute. Mass. G. L. c. 152, §1 et seq.

Westvaco removed the action to the United States District Court for the District of Massachusetts, Springfield Division, on the basis of diversity of citizenship. Mrs. Sweeney then filed an amended complaint, adding as defendants three of Mr. Sweeney's supervisors, Richard Laffargue, Louis Ronzoni, and Lorenzo Sanchez.[2] The parties consented to conduct all further proceedings, including trial and entry of judgment, before a United States Magistrate, pursuant to 28 U.S.C. § 636(c). App. B at 11b.

After a seven-day trial in June, 1989, the jury returned a verdict for all defendants on the claim of loss of consortium based upon intentional

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[2] Charles Hill, also added as a defendant, was subsequently dismissed by stipulation before trial.

infliction of emotional distress, and a verdict for plaintiff and against all defendants on the claim of loss of consortium based on negligent infliction of emotional distress. The jury awarded plaintiff $1.5 million in damages. Judgment was entered in the amount of $1.5 million, plus interest of $579,768, for a total of $2,079,768. App. B at 12b.

In their requested jury instructions, defendants asked the District Court to instruct the jury that if it found that the defendants' conduct toward Mr. Sweeney was in accordance with the terms of the collective bargaining agreement between the company and the union, then the jury must find for the defendants. App. A at 12a-13a. In making this request, defendants' counsel explained

that it would be "inconsistent with Federal Labor law which . . . encourages the negotiation of collective bargaining agreements . . . to permit Plant Managers to be held liable for acting strictly in accordance with negotiated collective bargaining agreements." App. A at 15a. The District Court denied the request. Defendants' counsel did not explicitly argue that § 301 of the Labor Management Relations Act preempted the action. App. B at 14b.

The District Court's Opinion and Judgment

Following the verdict, defendants moved for judgment notwithstanding the verdict on the ground that plaintiff's state law claim was preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. §185. The District Court granted this motion. In its opinion the District

Court noted that under the principles set forth by this Court in Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) and Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988), an employee's state law tort claim is preempted by § 301 "if the resolution of [the] state-law claim depends upon the meaning of a collective-bargaining agreement." Lingle, 486 U.S. at 405-06. In the present case, the District Court ruled, the defendants' conduct could be assessed only in the context of the rules of the workplace, and "can only be viewed through the lens of the collective bargaining agreement." App. B at 42b-43b.[3] The District Court noted that the

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[3] Specifically, the District Court concluded:

> [T]he actions complained of by the plaintiff were submerged, at the time

case did not involve "outrageous" conduct, such as that found by this Court not to be preempted under the National Labor Relations Act in Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, 430 U.S. 290 (1977). The jury had explicitly rejected the claim of intentional infliction of emotional distress, and had returned a verdict solely on negligent infliction. App. B at 26b-29b. Accordingly, the

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> the actions were taken, in the complex of interrelationships in the workplace environment. The initial warning, for example, was issued pursuant to specific written guidelines. The significance of the bad faith refusal to accept the medical certificate implicates the rules of the workplace. The conduct of the safety engineer, the supervisors' demands for greater speed and the plaintiff's husband's eventual demotion and transfer can be viewed only through the lens of the collective bargaining agreement.

App. B at 42b-43b.

District Court ruled that any claim for negligent infliction was preempted by § 301. App. B. at 43b. The District Court also held that because Mr. Sweeney's claim was preempted by § 301, so necessarily was Mrs. Sweeney's derivative claim for loss of consortium growing out of the alleged injury to Mr. Sweeney. App. B at 43b-46b.[4]

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[4] The District Court considered, and rejected, plaintiff's contention that regardless of any preclusive effect that the § 301 preemption doctrine might have on her husband's claims, it does not reach her consortium claim. The District Court concluded that plaintiff's argument that her claim was "independent" of her husband's claims, and therefore not precluded, was "supported by neither common sense nor caselaw." App. B at 21. The District Court cited Johnson v. Anheuser Busch, Inc., 876 F.2d 620 (8th Cir. 1989), in which the Eighth Circuit held preempted under § 301 a loss of consortium claim that, like the plaintiff's claim in the present case, was dependent for its proof upon an underlying claim that required the interpretation of a collective bargaining agreement. App. B at 45b.

In granting defendants' motion for judgment notwithstanding the verdict, the District Court ruled that defendants had not presented their § 301 preemption argument until after the close of trial. If the ordinary rules of waiver applied, therefore, the § 301 preemption defense would have been waived.[5] The District Court went on to conclude, however, that "the normal rules of preservation do not apply" (emphasis in original), because preemption by federal labor law implicated the court's subject matter

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[5] Defendants argued to the District Court and to the Court of Appeals that the references to federal labor law in their motion for directed verdict and in their requested jury instruction had been sufficient to preserve the § 301 preemption defense under the ordinary rules of waiver. The Court of Appeals agreed with the District Court that defendants' references to § 301 had not been sufficient. In this Petition, defendants do not challenge this determination by the Court of Appeals.

jurisdiction. App. B at 18b-19b. Having held that the § 301 preemption defense could be raised at any time before final judgment, the District Court concluded that § 301 in fact preempted plaintiff's state law tort claim.

The First Circuit's Opinion and Judgment

On respondent's appeal, the Court of Appeals entered an opinion and judgment reversing the District Court's judgment, on the ground that defendants had waived the § 301 preemption issue by not raising it before the end of the trial.[6]

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[6] After plaintiff's initial brief had been filed with the Court of Appeals, defendants recognized for the first time that one of the defendants added by the plaintiff, Mr. Ronzoni, was a citizen of Massachusetts, as was Mrs. Sweeney. Upon making this discovery, defendants filed a Suggestion of Lack of Subject Matter Jurisdiction, on the ground that there was a lack of complete diversity between the parties. In order to restore

In its opinion reversing the judgment notwithstanding the verdict, the Court of Appeals acknowledged that, under the principles set forth in Lingle, courts of appeals "have held that tort actions similar to this one are pre-empted under § 301(a)." App. A at 22a. The Court of Appeals did not reach the question of whether § 301 preempted the plaintiff's claim in the present case, however. Instead, the Court of Appeals held that the ordinary rules of waiver applied to defendants' § 301 preemption defense and that the defense had been waived. App. A at 25a-46a.

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diversity, the Court of Appeals allowed plaintiff's motion to dismiss Mr. Ronzoni from the case, citing as authority this Court's opinion in Newman-Green, Inc. v. Alfonzo-Larrain, 109 S.Ct. 2218, 2225-26 (1989). See App. A at 46a-53a. Defendants do not challenge this ruling in this Petition.

The Court of Appeals rejected the District Court's holding that a § 301 preemption claim implicates the court's subject matter jurisdiction to hear the case and, therefore, is not waivable. In so holding, the First Circuit followed the Ninth Circuit's holding in Johnson v. Armored Transport of California, Inc., 813 F.2d 1041, 1044 (9th Cir. 1987), and explicitly rejected the Third Circuit's directly contrary holding in Carpenters Health and Welfare Fund of Philadelphia and Vicinity v. Kenneth R. Ambrose, Inc., 665 F.2d 466, 469-70 (3d Cir. 1981), App. A at 36a-40a.

The Court of Appeals also considered defendants' argument that the jurisdictional nature of the § 301 preemption claim is implied, if not compelled, by this Court's holding in

International Longshoremen's Ass'n v. Davis, 476 U.S. 380 (1986), that a preemption claim under § 7 or § 8 of the National Labor Relations Act (a "Garmon preemption" claim) implicates the court's subject matter jurisdiction and is not waivable. The Court of Appeals stated that "we find Westvaco's argument a strong one." App. A at 31a. It concluded, however, that Davis applied only to Garmon preemption, and did not extend to § 301 preemption.

The First Circuit also considered defendants' argument that even if the § 301 preemption defense is not jurisdictional, the normal waiver rules should not be applied because of this Court's consistent teaching that § 301 mandates the uniform application of federal law, rather than state tort law,

to the interpretation of collective bargaining agreements. The First Circuit stated that "Westvaco may well be right on this point," and acknowledged that the Sixth and Seventh Circuits have both declined to apply the usual waiver rule in cases involving § 301 preemption claims. See Apponi v. Sunshine Biscuits, Inc., 809 F.2d 1210, 1215 (6th Cir.), cert. denied, 484 U.S. 820 (1987); National Metalcrafters, Div. of Keystone v. McNeil, 784 F.2d 817, 825-26 (7th Cir. 1986). Nevertheless, the First Circuit declined to make such an "exception from the normal waiver rule." App. A at 42a-46a.

At no point in its opinion did the Court of Appeals suggest that plaintiff's tort claim, which was decided by a jury applying Massachusetts state law, was not

in fact preempted by § 301. To the contrary, the Court of Appeals conceded that in a case like the present one, "when the reasonableness of [the employer's] conduct is at issue, pre-emption of the tort action is likely, . . . leaving the parties to whatever remedies the bargaining agreement . . . may provide." App. A at 22a-23a. The Court of Appeals made clear that it reversed the District Court's judgment solely because Westvaco raised its preemption argument "too late in the day." App. A at 4a. Accordingly, the Court of Appeals remanded the case to the court below with instructions to

reinstate the jury's verdict.[7] No petition for rehearing was filed.

REASONS FOR GRANTING THE WRIT

I. THIS COURT HAS NEVER ADDRESSED THE QUESTION WHETHER PREEMPTION OF STATE LAW CAUSES OF ACTION BY SECTION 301 IS WAIVABLE.

This case presents a preemption issue this Court left open in Davis: whether preemption arising under § 301 of the Labor Management Relations Act is waivable. In Davis, this Court decided the identical issue in the context of Garmon preemption and held that such a preemption claim could not be waived.[8]

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[7] On defendants' cross-appeal, the Court of Appeals upheld the District Court's denial of defendants' motions for a new trial and for a remittitur of damages. Defendants do not challenge these rulings in this Petition.

[8] Preemption because the conduct at issue is arguably protected by Section 7 or prohibited by Section 8 of the National

The Court found that Garmon preemption deprived the court of power to adjudicate state law causes of action and that preemption could be raised for the first time in a motion for judgment notwithstanding the verdict. 476 U.S. at 387-93.

In footnote 9 of the Davis decision, the Court left open questions regarding the nature of other forms of preemption. According to the Court, "[t]he nature of any specific pre-emption claim will depend on congressional intent in enacting the particular pre-empting statute." Id. at 391 n.9. While a long line of cases from the Court have established the "extraordinary force" of

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Labor Relations Act is known as "Garmon preemption," after San Diego Buildings Trades Council v. Garmon, 359 U.S. 236 (1959).

§ 301 preemption claims, none has addressed the nature of such claims. See, e.g., Teamsters Local v. Lucas Flour Co., 369 U.S. 95 (1962); Allis-Chalmers, 471 U.S. 202 (1985); Caterpillar Inc. v. Williams, 482 U.S. 386 (1987). The instant case presents this Court with an opportunity to address directly the issue of whether an otherwise valid assertion of § 301 preemption may be waived by a party or raised at any time.

Guidance from this Court with respect to this issue is needed because, as discussed in Point II below, the circuit courts of appeals are divided as to whether a § 301 preemption claim is jurisdictional or may be waived. As discussed in Point III below, moreover, the logic of the Davis decision strongly suggests that a § 301 preemption claim --

like a Garmon preemption claim -- may be raised at any time before final judgment. This conclusion also follows from this Court's consistent teachings over the past three decades, discussed in Point IV below, that, under § 301, the interpretation and enforcement of collective bargaining agreements must be governed exclusively by federal law, and that bargained-for arbitration and grievance procedures may not be sidestepped by bringing state law claims.

II. THE CIRCUIT COURTS THAT HAVE ADDRESSED THE NATURE OF § 301 PREEMPTION HAVE REACHED INCONSISTENT AND CONFLICTING RESULTS.

The circuit courts confronted with the procedural waiver issue regarding § 301 preemption claims have reached inconsistent and conflicting results. Prior to the First Circuit decision

below, only the Ninth Circuit had held that a claim of § 301 preemption could be waived if not timely raised in the trial court. See Johnson, 813 F.2d at 1044 (1987). Holding that this Court's decision in Davis did not control, both the First Circuit (in the opinion below) and the Ninth Circuit reasoned that § 301 preemption affected only "choice of law" and not "choice of forum" and was thus waivable if not timely raised.

Other circuits that have addressed the nature of § 301 preemption in analogous procedural contexts have found that the defense was not waived. In Carpenters Health, 665 F.2d at 469-70, the Third Circuit instructed the District Court that it could consider a defense of § 301 preemption on remand, even though the defendant had neither listed § 301

preemption as an affirmative defense nor raised the defense at any time during trial. The Third Circuit opinion stated that if the issue of preemption were not jurisdictional, a strong case for waiver could have been made. The court stated that because § 301 preemption was jurisdictional, however, the lower court could address the issue on remand. Id. The Third Circuit's view of the jurisdictional nature of § 301 preemption is thus in conflict with the holdings of the First and Ninth Circuits.[9]

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[9] In the opinion below, the First Circuit dismissed the Carpenters Health holding as "dicta in context, made without analysis." App. A at 40a. The First Circuit's perfunctory dismissal of Judge Higginbotham's holding in Carpenters Health was unjustified. The Carpenters Health holding was "dictum" only in a highly technical sense. The Carpenters Health court held that the District Court order was technically not appealable because the decision below was not final with respect to attorneys'

In addition, both the Sixth and Seventh Circuits have declined to apply the normal rules of procedural waiver in cases involving § 301 preemption. In Apponi, 809 F.2d at 1215, the Sixth Circuit held that a § 301 preemption claim should be addressed even though it was raised for the first time on the second appeal of the case. Recognizing that "Section 301 . . . expresses a compelling policy in favor of uniform application of federal law in actions to enforce labor contracts," the Sixth Circuit declined to apply the normal

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fees. In remanding the case to the District Court, however, the Third Circuit specifically invited the District Court to consider the issue of § 301 preemption, even though that issue had not been raised at trial. This holding was a clear and unambiguous statement of the Third Circuit's understanding that § 301 preemption is jurisdictional in nature.

waiver rule. Although the Sixth Circuit decision did not specifically address the jurisdictional nature of § 301 preemption, it nonetheless reached a result with respect to the waiver issue that is obviously contrary to the result reached by the First and Ninth Circuits. Similarly, in National Metalcrafters, 784 F.2d at 825-26, the Seventh Circuit, citing, inter alia, the "strongly held policy in favor of applying uniform federal principles to the interpretation of collective bargaining contracts," held that a § 301 preemption claim could be raised for the first time on appeal.

Whether a defense of § 301 preemption affects a court's jurisdiction to hear a claim, or because there exists a compelling national policy favoring uniform application of federal law in

cases involving the interpretation of collective bargaining agreements, at least three different circuit courts have found that normal rules of procedural waiver should not apply in cases involving § 301 preemption. Contrasted with the holdings of the First and Ninth Circuits, it is clear that the courts of appeals have differing and conflicting views regarding the nature of § 301 preemption and whether such a defense can be waived. The conflict should be resolved by this Court.

III. THE FIRST CIRCUIT'S DECISION IS INCONSISTENT WITH THIS COURT'S DECISION IN DAVIS.

The conclusion that an employer's § 301 preemption defense is not waivable is implied by this Court's decision in Davis. In Davis, this Court held that a

preemption claim under § 7 or § 8 of the National Labor Relations Act implicates the court's subject matter jurisdiction to hear the case and, therefore, is not waivable. 476 U.S. at 387-93. The Court explained that such "Garmon preemption" "rest[s] on a determination that in enacting the NLRA Congress intended for the [National Labor Relations] Board generally to exercise exclusive jurisdiction in this area." Id. at 391. Because "[a] claim of Garmon pre-emption is a claim that the state court has no power to adjudicate the subject matter of the case," id. at 393, such a claim is not subject to procedural waiver.

Although Davis dealt with Garmon preemption, its logic is directly

applicable to § 301 preemption as well.[10] The Davis Court explicitly stated that its decision applied "to those pre-emption claims that go to the State's actual adjudicatory or regulatory power as opposed to the State's substantive laws." Id. at 391 n.9 (emphasis added). Because § 301 preemption directly affects a court's power to adjudicate a state law cause of action, such preemption claims fall within the rationale of Davis.

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[10] Although Davis dealt with state court jurisdiction and state rules of waiver, the same analysis is fully applicable to federal court jurisdiction and federal rules of waiver. See Davis, 476 U.S. at 381-82 (characterizing the question before the Court as "whether Garmon pre-emption is in the nature of an affirmative defense that must be asserted in the trial court or whether it is in the nature of a challenge to a court's power to adjudicate that may be raised at any time").

In describing § 301 preemption, this Court has stated that its preemptive force is so strong as to "displace entirely" any state law cause of action arising under a collective bargaining agreement. Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 23 (1983). Citing this "extraordinary" force, this Court has held in the removal context that a state law claim preempted by § 301 is displaced by federal law "from its inception." Caterpillar, 482 U.S. at 393. In the present case, the First Circuit granted relief on an independent state tort law cause of action, based upon the District Court's diversity jurisdiction, and not under Section 301. If, however, as the prior decisions of this Court suggest, the extraordinary force of § 301

preemption operated to displace state law claims from their inception, the District Court should have been powerless to adjudicate these claims.

Stated simply, a federal court could not have exercised diversity jurisdiction over state law claims that ceased to exist from their inception by operation of the preemption doctrine. An assertion of § 301 preemption, whenever raised, is an assertion that a court is powerless to act on state law claims. This preemption claim goes to the heart of a court's "actual adjudicatory power," Davis, 476 U.S. at 391 n.9, and thus falls directly within the parameters of the Davis holding.

In considering petitioners' argument that the Davis holding should be applied to a § 301 preemption claim, the First

Circuit stated that "we find Westvaco's argument a strong one." App. A at 31a. Nevertheless, the court ultimately declined to apply Davis to the issue of § 301 preemption. The Court of Appeals held that Davis was applicable only to a case in which federal law assigned labor disputes to a specific tribunal (the National Labor Relations Board ["NLRB"]) and not to a case in which Congress had mandated a particular mode of adjudication (the grievance and arbitration procedures set forth in a collective bargaining agreement). App. A at 32a-37a. See also Johnson, 813 F.2d at 1043-44 (distinguishing similarly between "choice of law" and "choice of forum" in the context of § 301 preemption). This rationale fails to recognize either the true nature of § 301

preemption or the importance of arbitration in the federal labor law scheme.

Although the First Circuit characterized § 301 preemption as "choice of law" preemption, the court failed to recognize that the application of that "law" necessarily involves a determination of the appropriateness of the forum. Under the federal "law" of labor contracts, courts have no jurisdiction to hear independent state causes of action that involve the interpretation of collective bargaining agreements. In these situations, the § 301 preemption doctrine dictates that it is the arbitrator who "has the responsibility to interpret the labor contract in the first instance." Allis-Chalmers, 471 U.S. at 220. See also

United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 37 (1987) ("where the contract provides grievance and arbitration procedures, these procedures must first be exhausted and courts must order resort to the private settlement mechanisms without dealing with the merits of the dispute").[11] The grievance and arbitration process under a collective bargaining agreement is thus the analog, for purposes of § 301 preemption, to the exclusive jurisdiction of the NLRB for purposes of Garmon preemption. Just as Congress designated the NLRB as the forum to resolve violations of the National Labor Relations Act, Congress empowered and

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[11] The national policy favoring the exclusive use of grievance and arbitration procedures under a collective bargaining agreement is discussed further in Point IV below.

encouraged employers and unions to designate arbitration as the forum to resolve disputes covered by the collective bargaining agreement. See Labor Management Relations Act § 203(d), 29 U.S.C. § 173(d).

The First Circuit rejected the argument that arbitration was an analogous forum to the NLRB for jurisdictional purposes so as to fall within the holding of Davis, citing several § 301 cases in which the parties were found to have waived the benefit of arbitration procedures. App. A at 35a-36a (citing Jones Motor Co. v. Teamsters Local Union No. 633, 671 F.2d 38, 42-44 (1st Cir.), cert. denied, 459 U.S. 943 (1982); Reid Burton Constr., Inc. v. Carpenters Dist. Council of S. C olo., 614 F.2d 698, 702 (10th Cir.),

cert. denied, 449 U.S. 824 (1980); E.T. Simonds Constr. Co. v. Local 1330, Int'l Hod Carriers, 315 F.2d 291, 295 (7th Cir. 1963)). The court's reasoning fails to take into account the difference between actions brought in the first instance under § 301 of the Labor Management Relations Act and actions brought under state law. While a trial court may have jurisdiction under § 301 to entertain a claim that a collective bargaining agreement has been violated, the court lacks jurisdiction to entertain an independent state law cause of action that is otherwise preempted. In the latter situation, the strength of the preemption doctrine extinguishes independent state law causes of action that require the interpretation of collective bargaining agreements. Such

state law causes of action, unlike § 301 suits, cannot be brought anywhere. The First Circuit's failure to recognize the jurisdictional nature of § 301 preemption and to apply the rationale contained in Davis was erroneous and warrants this Court's review.

IV. THE FIRST CIRCUIT'S DECISION IS INCONSISTENT WITH THE COMPELLING NATIONAL POLICIES FAVORING THE UNIFORM APPLICATION OF FEDERAL LAW AND THE USE OF BARGAINED-FOR GRIEVANCE AND ARBITRATION PROCEDURES IN THE RESOLUTION OF LABOR-MANAGEMENT DISPUTES.

Even if this Court should decide that the Davis holding is not necessarily applicable to § 301 preemption, the decisions of the Court establish that § 301 preemption is too important an element of federal labor policy to be subject to normal rules of waiver. As noted in Point II above, the Sixth and

Seventh Circuits have taken this view. See Apponi, 809 F.2d at 1215; National Metalcrafters, 784 F.2d at 825-26. By holding that an otherwise valid § 301 preemption claim can be waived if it is not raised before the close of trial, the decision below flies in the face of the compelling national policies that underlie § 301: the need for the uniform application of federal law -- and not the laws of the 50 states -- to the resolution of labor-management disputes, and the importance of applying contractually bargained-for grievance and arbitration procedures to such disputes.

It has been settled law for more than three decades that the federal regulation of collective bargaining agreements is both pervasive and exclusive. In Textile Workers v. Lincoln Mills, 353 U.S. 448,

451 (1957), this Court held that § 301 "authorizes federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements." In Lucas Flour, this Court went on to hold that, because of the compelling federal interest in a uniform national labor policy, the interpretation and enforcement of collective bargaining agreements are to be governed exclusively by federal law. The Court emphasized:

> The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy.

369 U.S. at 104.

In its subsequent decisions, this Court has consistently emphasized the overriding importance of uniform federal labor law. Thus, in Allis-Chalmers, 471 U.S. at 211, the Court declared that "[t]he interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation." Similarly, in Lingle, 486 U.S. at 405-06, the Court explained that "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is preempted and

federal labor-law principles -- necessarily uniform throughout the nation -- must be employed to resolve the dispute."[12] See also Franchise Tax Board, 463 U.S. at 23 ("the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of

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[12] The collective bargaining agreement in the present case, for example, governs seven union plants located in six different states. The inconsistent application of state tort law to employer and employee conduct regulated by the Agreement -- such as the overtime policy, the system of progressive discipline, and the transfer provisions that were at issue in this case -- would undermine the Agreement's expressly bargained-for provisions. The application of state law would also inhibit the negotiating process because the meaning of any collective bargaining agreement would be subject to the vagaries of the laws of many different states. Moreover, supervisors who relied on the contract to establish norms of conduct could find themselves, as in the present case, subject to tort damages for conduct that was arguably permitted or even required by the collective bargaining agreement.

action 'for violation of contracts between an employer and a labor organization'") (quoting Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557, 560 (1968)).

The driving force behind the § 301 preemption doctrine is the federal policy favoring the enforcement of labor agreements by the grievance and arbitration mechanisms negotiated between management and labor.[13] See, e.g., Boys

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[13] In the well-known "Steelworkers trilogy," this Court articulated the strength of the national policy in support of arbitration. In United Steelworkers of America v. American Mfg. Co., 363 U.S. 574 (1960), this Court reversed a lower court's refusal to compel arbitration, emphasizing the importance of grievance and arbitration and noting the lack of judicial competence in dealing with labor-management disputes. Id. at 567-68. See also United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

Market, Inc. v. Retail Clerks, 398 U.S. 235 (1970) (emphasizing the "important federal policy" of resolving disputes through arbitration). The congressional intent at the heart of this policy is set forth in § 203(d) of the Labor Management Relations Act, which endorses "final adjustment by a method agreed upon by the parties" as the preferred means for resolving disputes involving the interpretation of collective bargaining agreements. 29 U.S.C. § 173(d). As this Court has explained, "grievance and arbitration procedures are part and parcel of the ongoing process of collective bargaining." Misco, 484 U.S. at 38.

In Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53 (1965), this Court held that, in light of the strong federal

interest in the arbitration of disputes arising under a collective bargaining agreement, courts must presume the grievance and arbitration procedures contained in such an agreement to be exclusive remedies unless the agreement explicitly states otherwise. The Court emphasized that "[i]f a grievance procedure cannot be made exclusive, it loses much of its desirability as a matter of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.'" Id. at 653 (quoting Lucas Flour, 369 U.S. at 103).

More recently, in Allis-Chalmers, 471 U.S. 202, this Court stressed the significance of requiring a union

employee who is a party to a labor contract to exhaust grievance procedures:

> A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness,. . . as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance.

Id. at 220 (citation omitted).

In the present case, it is undisputed that Mr. Sweeney was bound by a collective bargaining agreement between his employer and his union that required labor-management disputes to be resolved by grievance and arbitration, and that Mr. Sweeney never invoked these procedures. To hold that defendants waived an otherwise valid § 301 defense would condone the "sidestep[ping]" of arbitration and grievance procedures that

this Court condemned in Allis-Chalmers. Id. at 220. Such a ruling would also defy federal labor law and policy by allowing liability to be imposed upon an employer under state tort law for conduct that is in fact permitted or even required by a collective bargaining agreement. In addition, by permitting arbitration to be bypassed, such a ruling would allow jurors with little relevant expertise to decide the appropriateness of conduct in the workplace, rather than expert arbitrators as envisioned by Congress.[14] Parties to a collective

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[14] The present case exemplifies the problems associated with allowing juries to decide state law claims involving workplace conduct that is governed by a collective bargaining agreement. At trial, petitioner requested a jury instruction that used the collective bargaining agreement as the standard for reasonable conduct. The First Circuit upheld the rejection of this request, on the ground that the proposed instruction

bargaining agreement should be secure in the knowledge that their actions in the workplace are governed by the agreement, and by the "common law of the shop" as construed by arbitrators, rather than by the common law of the particular state in which one of the plants covered by the agreement is situated. See Steelworkers v. Warrior & Gulf Co., 363 U.S. at 579-81.

Still another negative consequence of a rule that permitted § 301 preemption claims to be subject to procedural waiver

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was "confusing" to the jury. Appendix A at 13a. Arbitrators, however, regularly deal with the kinds of issues presented in this case: overtime, discipline, plant safety, and employee transfers. Arbitrators also regularly determine whether an employer's conduct in such matters was appropriate under the terms of a collective bargaining agreement. Petitioners thus lost the opportunity to have their collective bargaining agreement set the standard for assessing the reasonableness of their conduct.

would be the encouragement of "artful pleading," in which plaintiffs would attempt to disguise or obscure grievances arising under collective bargaining agreements in order to pursue state law tort claims. Notwithstanding the development of the § 301 preemption doctrine, plaintiffs continue to bring as state tort claims workplace disputes that may require the interpretation of collective bargaining agreements. A plaintiff will be less likely to attempt to disguise the true nature of such a claim in the hope of sidestepping grievance and arbitration mechanisms and getting to a jury if the plaintiff is aware that § 301 preemption may be raised no matter when it becomes apparent.

In the removal context, this Court has determined that plaintiffs cannot avoid

the application of § 301 preemption by couching their complaints exclusively in state law terms. See Avco Corp., 390 U.S. 557. Citing the "extraordinary" force of § 301 preemption, the Court held that such preemption overrides the "well pleaded complaint" rule and transforms a state law cause of action, from its inception, into a federal claim. See Caterpillar, 482 U.S. at 393. Just as the development of this § 301 "total preemption" exception to the well-pleaded complaint rule has discouraged artful pleading, so would a finding that claims of § 301 preemption cannot be waived.[15]

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[15] The First Circuit suggested that petitioners' failure to raise the preemption claim prior to their motion for judgment notwithstanding the verdict was unfair because it might have prevented plaintiff from "reshaping" her claim to avoid the need for contract interpretation. App. A. at 44a. Rather than discouraging artful pleading, this

In sum, the uniform application of federal labor law to the interpretation of collective bargaining agreements, including the use of bargained-for grievance and arbitration mechanisms, has been held by this Court to be a national policy of the highest importance. It would disserve this policy if an employer's otherwise valid § 301 preemption claim were deemed to have been waived solely because, in the First Circuit's words, "timing is all." App. A at 4a.

CONCLUSION

This Petition involves an important and recurring question that has divided the circuits with respect to the

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suggestion appears to condone the practice.

adjudication of claims involving the interpretation of collective bargaining agreements. The First Circuit's holding that a § 301 preemption claim is waivable if it is not properly presented before the close of trial is inconsistent with this Court's holding in Davis, as well as with the goals of federal labor policy. For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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May 13, 1991

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 90-1178

DOLORES SWEENEY,
Plaintiff, Appellant,

v.

WESTVACO COMPANY, ET AL.,
Defendants, Appellees.

No. 90-1258

DOLORES SWEENEY,
Plaintiff, Appellee,

v.

WESTVACO COMPANY, ET AL.,
Defendants, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Michael Ponsor, U.S. Magistrate Judge]

Before

Breyer, Chief Judge,
Selya, Circuit Judge,

and Pettine,* Senior District Judge.

Charles M. Burnim with whom William Y. Christie was on brief for plaintiff.

Jeffrey F. Jones with whom Maxwell L. Stearns and Palmer & Dodge were on brief for defendants.

February 12, 1991

BREYER, Chief Judge. The appeals in this diversity action arise out of Dolores Sweeney's claim that the defendants negligently caused her husband serious emotional suffering. The appeals focus upon two defenses. The first is that § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), pre-empts (and thereby forecloses) the kind of state-law tort suit that defendant Westvaco says is before us, namely a

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*Of the District of Rhode Island, sitting by designation.

claim that an employer negligently caused an employee's emotional suffering through conduct arguably falling within the scope of a collective bargaining agreement. See Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 407 (1988). The second is that we lack jurisdiction to hear these appeals because the plaintiff and one of the individual defendants are both citizens of Massachusetts; hence, a pre-requisite for diversity of jurisdiction, namely, complete diversity of citizenship between the parties, is missing. See Strawbridge v. Curtiss, 7 U.S. (3 Cranch.) 267 (1806).

Defendant Westvaco raised both these claims at the eleventh hour. It specifically made its pre-emption argument for the first time only after the jury returned a $1.5 million verdict

for the plaintiff. It pointed to the jurisdictional flaw for the first time only after appeal to this court. We believe that, in this case, timing is all and that Westvaco made its arguments too late in the day to prevail.

Westvaco's pre-emption claim falls afoul of the rule that, where possible, a party must raise an argument before the jury retires instead of waiting until after it has seen the verdict. The Magistrate (who tried this case with the parties' consent, see 28 U.S.C. § 636 (c)), thought this normal rule inapplicable because he thought the pre-emption argument was "jurisdictional," and could not be "waived." See International Longshoremen's Ass'n v. Davis, 476 U.S. 380, 391 (1986). He listened to the argument, agreed with

Westvaco, and set aside the jury's verdict. For rather complicated reasons that we shall explain, we disagree with the Magistrate about waiver.

Westvaco is, of course, free to point to a lack of diversity jurisdiction at any time. But the eleventh-hour nature of that claim leads us to grant the plaintiff's motion to dismiss the non-diverse defendant from the case, thereby restoring the court's jurisdiction. See Newman-Green, Inc. v. Alfonzo-Larrain, 109 S. Ct. 2218, 2225-26 (1989).

We have considered, and we reject, Westvaco's remaining arguments. Consequently, we order the jury's verdict for the plaintiff reinstated.

I

Preliminary Matters

Facts

In October 1984 George Sweeney suffered a nervous breakdown. Dolores Sweeney, his wife, believed that Westvaco and three of its supervisory employees negligently caused that breakdown. She sued them for loss of consortium. The jury awarded her $1.5 million. The underlying facts, as the jury might have found them, include the following:

1. George Sweeney worked more than twenty-nine years for Westvaco, an envelope manufacturer. He rose to the position of head adjuster, responsible for several envelope-making machines.

2. George Sweeney had overcome a background of adversity (birth defects, deafness in childhood, loss of a parent) , to become, in his adulthood, a conscientious, kind, and dedicated employee, liked and respected by his coworkers. He was happily married; he had no children. His work, in a sense, was his life.

3. In mid-1983, Westvaco began to implement a new policy mandating overtime when too few employees volunteered. George Sweeney began to worry about working overtime too soon after his regular eight-hour shift. He had lost four fingers in an industrial accident; he also had back problems. He feared that operating machinery after an eight-hour day would put too much strain on his back. He had often worked overtime voluntarily, however, and he was willing to work overtime on weekends, after he had a night to rest his back.

4. During Christmas week of 1983, George Sweeney refused to work overtime on several occasions. On December 28, 1983, his superior, Louis Ronzoni, gave George a verbal warning (later reduced to writing). George saw this action as a step that could lead to dismissal. He worried that he might lose his job.

5. During the course of the next few months, perhaps because George would not work regular overtime, perhaps because Mrs. Sweeney (successfully) appealed to higher management to honor George's medical excuse, Ronzoni, along with other

supervisors, harassed, taunted, and humiliated George.

a. Richard Laffargue gave George the impression that he would not accept a doctor's certification that George could not work overtime except on weekends;

b. Laffargue told George to demonstrate, in front of his assembled coworkers, just how his lack of fingers put added strain on his back -- an order that George took as an effort deliberately to humiliate him;

c. Lorenzo Sanchez and other supervisors taunted George for not being able fully to carry out his work responsibilities;

d. After Mrs. Sweeney appealed to management (over their heads), George's supervisors assigned particularly slow workers to work under George and put him in charge of machines particularly likely to break down;

e. Ronzoni and the other supervisors planned to

demote George to work in the tool crib - a low-level job with no responsibilities other than handing out tools to other employees;

f. Ronzoni told George about his demotion by calling him into his office, and saying "You're all done," implying thereby that George had been fired, and then leaving George several minutes to think about this before explaining that George had, in fact, been demoted, not fired.

Although a simple summary description of these incidents may make any one of them seem to amount to no more than tactless behavior, in context, the evidence permitted the jury to find behavior of unusual callousness or cruelty.

6. George subsequently had a serious emotional breakdown. He cannot work or maintain ordinary human relationships. His wife has become, in effect, a caretaker, (as one expert witness testified) like a wife with a husband who has Alzheimer's disease.

Procedural Background

Dolores Sweeney, a citizen of Massachusetts, originally brought this lawsuit in Massachusetts Superior Court against Westvaco alone. She charged that Westvaco negligently or intentionally caused her husband emotional suffering. She sought damages for her own loss of consortium. (At the time, Massachusetts law allowed such a suit. See Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (1980) (workers compensation statute does not bar an employee's spouse from suing the employer for loss of consortium due to injury to the employee).) Westvaco, a citizen of another state, removed the suit to federal court. In federal court, Dolores Sweeney added as defendants several of George's supervisors, one of whom

(Ronzoni) now turns out to be a resident of Massachusetts.

As previously mentioned, the case proceeded to trial; the jury found in plaintiff's favor; Westvaco, making several arguments, including pre-emption, asked for a judgment notwithstanding the verdict; and the Magistrate accepted Westvaco's pre-emption argument (while rejecting the others). The Magistrate, on grounds of pre-emption alone, set aside the jury's verdict and entered judgment for the defendants. Both sides have appealed.

II

Trial-Related Errors

For purposes of exposition, we find it easiest to consider at the outset Westvaco's claims that it should win (i.e., that the jury's verdict should

have been set aside) even if it does not prevail on its pre-emption argument. Westvaco renews in this court three such claims of trial-related error. The Magistrate rejected each of these claims. And, we agree with the Magistrate that they have little merit.

First, Westvaco says that the Magistrate wrongly refused to submit to the jury a proposed instruction that reads as follows:

> If the conduct of defendants . . . toward George Sweeney was in accordance with the terms of the Collective bargaining agreement between the Company and the Union, or in accordance with the Provisions of the Guidelines for Filling Overtime Needs adopted pursuant to the collective bargaining agreement, then you must find for the defendants in this case. Conduct in accordance with the terms of a collective bargaining agreement cannot provide the basis for a claim of intentional and/or negligent

infliction of emotional distress.

The Magistrate rejected this instruction because he felt it would confuse the jury, saying that it "raises more problem, than it answers." In our view, the Magistrate had the legal power to reject the instruction. Parties have no right to an instruction that would confuse the jury. See, e.g., Shane v. Shane, 891 F.2d 976, 987 (1st Cir. 1989). And, in the context of the case as argued, the Magistrate's reaction to the instruction -- that it would confuse the jury -- was reasonable.

For one thing, the language of the instruction is confusing. What, for example, do the words "conduct . . . in accordance with" mean? Do they mean "conduct mandated" by the collective bargaining agreement? If so, the

instruction does not seem to apply to any of the instances we mentioned in ¶ 5(a)-(f) of the facts above. See pp. 5 - 6, supra. Or, do those words mean "conduct of a sort that the collective bargaining agreement specifically states that management may engage in?" If so, the instruction seems to fit some of the instances listed in ¶ 5 (a) - (f) (arguably, (a), (b), (d) and (e)), but not others ((c) or (f)). Or, do the words mean "conduct that the collective bargaining agreement does not forbid management to engage in?" If so, the record, as argued by the parties, does not permit us to determine which of the instances described in ¶ 5(a)-(f) the language would fit. In any event, what was the jury to do if it believed that some, but not all, of the incidents

listed in ¶ 5(a)-(f) were "in accordance with" the collective bargaining agreement? The instruction does not say. We can find no closing arguments, trial arguments, or other circumstances that would have clarified to the jury just how it was to apply the instruction to the case.

For another thing, Westvaco did not explain clearly to the Magistrate the legal reason why it thought he ought to give the instruction or something like it. Counsel did tell the Magistrate that he thought it would be "inconsistent with Federal Labor Law which . . . encourages the negotiation of collective bargaining agreements . . . to permit Plant Managers to be held liable for acting strictly in accordance with negotiated collective bargaining agreements." Counsel also

said, however, that he did not have "any authority" on the point and that it was an "interesting and unique question." He did not mention the word "pre-emption," nor did he elucidate the matter any further.

In light of these circumstances -- 1) counsel's failure to call the Magistrate's attention specifically and clearly to the important pre-emption issue (which apparently no one had previously mentioned in the case); 2) the confusing language of the instruction; and 3) counsel's failure to elucidate the matter any further -- we conclude that the Magistrate need not have instructed the jury on the point of law. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990), cert. denied, 110 S. Ct. 1814 (1990) ("'Judges are not expected to be

mindreaders. Consequently, a litigant has an obligation "to spell out its arguments squarely and distinctly," or else forever hold its peace."') (quoting Rivera-Gomez v. de Castro, 843 F.2d 631, 635 (1st Cir. 1988) (quoting Patterson-Leitch Co. v. Massachusetts Mun. Wholesale Elec. Co., 840 F.2d 985, 990 (1st Cir. 1988))).

Second, Westvaco complains that, when Mrs. Sweeney's lawyer cross-examined codefendant Ronzoni, he elicited the fact that Ronzoni had consulted as many as five lawyers. The Magistrate admitted the answer, presumably as showing that Ronzoni had likely prepared his defense, and probably his answers to questions, with care. Westvaco says that it suffered prejudice because these questions allowed plaintiff "to highlight

to the jury that Westvaco is a large corporation committing significant resources to defending this case." The legal question posed on appeal is simply whether the Magistrate went beyond the broad powers given to him in Fed. R. Evid. 403 to weigh "relevance" against likely "prejudice." We conclude that he did not act unlawfully. The Magistrate gave the jury a cautionary instruction, which we must presume the jurors followed. See Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 574 (1st Cir. 1989). And, were admission of the answer error, in our view it would be harmless, so that it cannot lead to reversal. See 28 U.S.C. § 2111.

Third, Westvaco says that $1.5 million is too much and asks us to order remittitur. We may not do so unless,

after taking appropriate account of the reaction of the trial court, which has seen the evidence and the parties first hand, we find the award shockingly high. See Brown v. Freedman Baking Co., 810 F.2d 6, 11 (1st Cir. 1987). The trial court did not find the award shockingly high. Considering that the Sweeneys had been happily married for years, that Dolores Sweeney's marriage has changed from a source of joy and comfort to a nursing, or custodial, relationship, and that the custodial relation may last many more years, we find the damage award high, but not "shockingly" so.

III

Pre-emption

A. Westvaco's Pre-emption Argument

Westvaco's basic argument on this appeal is that the Magistrate correctly

granted its motion for judgment n.o.v. because federal labor law pre-empted Mrs. Sweeney's state-law cause of action. Westvaco's two-part pre-emption argument (which it developed after the jury returned its verdict) runs as follows: First, to award Mrs. Sweeney a judgment, a court must find (through judge or jury) that Westvaco's (or its supervisors') actions were unreasonable. To do so, the court would have had to interpret the collective bargaining agreement. That is because the reasonableness of the actions that we set out above in ¶ 5 (a)-(f), such as giving George Sweeney a verbal warning, requiring him (perhaps for safety reasons) to show how lifting a machine might injure his back, assigning him particular employees and particular machines, demoting him to the tool crib,

and telling him about his demotion, depend (in Westvaco's view) upon the extent to which the collective bargaining agreement gave Westvaco authority to carry out such activities.

Second, Congress has said that courts, when they interpret (or review determinations of arbitrators who interpret) collective bargaining agreements, must apply federal law. Indeed, they are to create a body of federal common law that applies to disputes arising out of collective bargaining agreements. Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 456 (1957). The Supreme Court has held that federal labor law pre-empts state-law claims that "require construing the collective-bargaining agreement." Lingle, 486 U.S. at 407.

And, lower courts therefore have held that tort actions similar to this one are pre-empted under § 301(a). E.g., Douglas v. American Information Technologies Corp., 877 F.2d 565, 569-73 (7th Cir. 1989) (intentional infliction of emotional distress under Illinois law); Truex v. Garrett Freightlines, Inc., 784 F.2d 1347, 1351-52 (9th Cir. 1985) (intentional infliction of emotional distress under California law). Of course, if a court can resolve a state tort suit without need to interpret a collective bargaining agreement, federal labor law does not preempt the suit. Lingle, 486 U.S. at 408-10. But when the reasonableness of conduct is at issue, pre-emption of the tort action is likely, see International Bhd. of Elec. Workers v. Hechler, 481 U.S. 851, 862 & n.5

(1987); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 215-16 (1985), leaving the parties to whatever remedies the bargaining agreement (or, say, workmen's compensation) may provide.

B. Waiver

The merits of the pre-emption argument, however, need not be reached here as Westvaco has a timing problem. Under ordinary procedural principles, Westvaco forfeited its right to raise the argument at all, by waiting to raise it until after the jury reached its verdict. See Fed. R. Civ. P. 50 (b). The record makes clear that Westvaco did not alert the court to the problem. In its pretrial memorandum, Westvaco told the court that the case raised "no jurisdictional issues," and it "agreed with plaintiff's statement" that the case

was a simple tort suit that did not present "any unusual issues of law." Westvaco failed to mention the matter in its motion for a directed verdict. The Magistrate, who ruled on pretrial motions, conducted the trial, held a charge conference, and heard all the parties' arguments, wrote that Westvaco did not give "notice of any pre-emption issue" until after the jury returned its verdict and Westvaco filed its motion for judgment notwithstanding the verdict.

Westvaco says that its request for the jury instruction discussed at pp. 7 - 10, supra, amounts to earlier notice. But, as we already said, neither that instruction, nor any of the discussion concerning it, raised the issue of pre-emption with sufficient clarity to entitle Westvaco to a jury instruction on

the issue. And, even if it had done so, that fact would not help Westvaco, because of its silence in its motion for a directed verdict. Ordinarily, a "party may not base its motion for a judgment n.o.v. on a ground that was not argued in its motion for directed verdict." Systemized of New England, Inc. v. SCM, Inc., 732 F.2d 1030, 1035 (1st Cir. 1984) (applying Fed. R. Civ. P. 50(b)). Except as we discuss below, there is no obvious basis for an exception here.

C. Westvaco's "Anti-Waiver" Argument

Westvaco argues against applying normal procedural principles on the ground that a 1986 Supreme Court case, International Longshoremen's Ass'n v. Davis, 476 U.S. 380 (1986), makes its pre-emption defense nonwaivable. In that case, Davis, a supervisor who had tried

to unionize his colleagues, brought a state-law fraud action against the union that had urged him to make his union organizing effort. Davis claimed that labor union representatives had falsely represented that the union could protect him from his employer's retaliatory dismissal. Id. at 385. After the jury found for Davis and awarded him damages, the union, for the first time, argued pre-emption in a motion for judgment n.o.v. The union argued that Davis's fraud claim sought to hold the Union liable for conduct "arguably subject toll § 7 or § 8 of the National Labor Relations Act, 29 U.S.C. § 157 or § 158, namely, conduct that the NLRA "protects" or "prohibits." Hence, the union added, under well-established precedent, the courts could not adjudicate the

lawfulness of the activity, and "must defer to the competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." Id. at 390 (quoting San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959)).

The Supreme Court said in Davis that the union's "pre-emption" defense was "jurisdictional" in nature. See 476 U.S. at 391. "Pre-emption" in this context meant that Congress had deprived the courts of jurisdiction to decide certain kinds of cases, id., namely those cases involving underlying "conduct" that the National Labor Relations Act, "arguably protected or prohibited." Id. at 394 (citing Garmon). Presumably, Congress did so because it feared that court decision making, rather than National

Labor Relations Board decision making, in such cases would threaten the development of uniform labor relations law, a task it left primarily to the Board. Id. at 389 (citing Garner v. Teamsters Local Union No. 776, 346 U.S. 485, 490-91 (1953)). Because the pre-emption defense was "jurisdictional" in such cases, it was not a "waivable defense." 476 U.S. at 389. Rather, pre-emption amounted to a "non-waivable foreclosure of the state court's very jurisdiction to adjudicate." Id.

D. Our Analysis

Ultimately, we must decide whether Davis governs the case before us. Pre-emption is a matter of congressional intent, as embodied, explicitly or implicitly, in a particular federal statute. See Malone v. White Motor Corp.,

435 U.S. 497, 504 (1978). And, as Westvaco concedes, the Supreme Court in Davis considered Congress's intent as embodied, not in the statute now before us (§ 301 of the Labor Management Relations Act), but in a different statute, namely, § 7 and § 8 of the National Labor Relations Act, which it had previously interpreted as preempting suits involving "arguably protected or prohibited" conduct. Davis, 476 U.S. at 394 (citing Garmon). Nonetheless, Westvaco says, the two statutes are highly analogous: the NLRA reflects a congressional intent that the Board (not courts) develop uniform federal labor laws; the LMRA reflects a congressional intent that arbitrators (not courts) develop and explain the meaning of terms in a collective bargaining agreement. Cf.

Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965) ("Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the common law of the plant.'"). If the Supreme Court has held in Davis that Congress (in the NLRA) removed court jurisdiction to decide matters that normally would go to the Board in the first instance, so it would hold in a case like this one that Congress (in the LMRA) removed court jurisdiction to decide matters that normally would go to arbitrators in the first instance. "For purposes of § 301 [i.e., LMRA] pre-emption," argues Westvaco, "the exclusive grievance and arbitration process under the Agreement is the analog to the exclusive jurisdiction of the NLRB for purposes of

Garmon [i.e., NLRA] pre-emption." Consequently, Westvaco concludes, LMRA pre-emption, like NLRA pre-emption, is a claim that a party can raise at any time, even after the jury has returned a verdict. Although we find Westvaco's argument a strong one, ultimately we disagree with it, for several reasons. First, as we noted in Brown v. Trustees of Boston University, 891 F.2d 337 (1st Cir. 1989), cert. denied, 110 S. Ct. 3217 (1990), the Supreme Court carefully limited its holding in Davis. It made clear that it was describing Congress's "jurisdictional" intent in respect to §§ 7 and 8 of the NLRA, not other statutes. See Brown, 891 F.2d at 363. Moreover, the Court spoke of Congress's intent, in respect to pre-emption by §§ 7 and 8 of the NLRA, as involving "a choice-of-forum

rather than a choice-of-law question." Davis, 476 U.S. at 391. And, it warned in a footnote that

> our decision today does not apply to pre-emption claims generally but only to those pre-emption claims that go to the State's actual adjudicatory or regulatory power as opposed to the State's substantive laws. The nature of any specific pre-emption claim will depend on congressional intent in enacting the particular pre-empting statute.

Id. at n.9.

Second, the basic rationale for Davis, the basic reason why the Court found a strong congressional intent to oust the state court as a forum, stemmed from its belief (expressed in Garmon) that Congress intended to "confide primary interpretation and application of its rules to a specific and specially constituted tribunal," id. at 389 (quoting Garner, 346 U.S. at 490)

(emphasis added), namely, the National Labor Relations Board, which would follow a specially constituted procedure, which would develop knowledge of, and expertise in, labor relations, and which would develop and apply nationally uniform labor-relations principles and practice. And, the Court apparently believed that Congress intended this to the point where Congress (sub silentio in the statutes) refused to permit parties to submit such a dispute to the courts even where the parties themselves wished to do so. Davis, 476 U.S. at 391.

This rationale does not apply in the case of § 301 of the LMRA -- at least it does not apply in one critical, outcome-determining aspect. Westvaco argues that the "alternative forum" in this case is the grievance and

arbitration procedure provided for in the collective bargaining agreement. We concede that arbitrators often do possess special expertise, and that federal labor policy favors arbitration as a method of settling disputes. See, e.g., 29 U.S.C. § 173(d); Republic Steel Corp., 379 U.S. at 653; United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596-97 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-82 (1960). We do not concede, however, that Congress believed this fact so important, important enough, important to the point that Congress wished to foreclose Parties from submitting such disputes to judicial fora. We are fairly certain about this because the law quite clearly permits parties to opt out of arbitration-based

dispute-resolving mechanisms, and to have courts decide those disputes instead. For one thing, the law does not require that collective bargaining agreements provide for grievance and arbitration procedures. See United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564, 570 (1960) (Brennan, J., concurring). Where the collective bargaining agreement does not do so, courts, not arbitrators, decide disputes arising under that agreement. For another thing, even if an agreement does provide for such mechanisms (as is the case here), the parties to a dispute may waive the benefit of these procedures. See Jones Motor Co. v. Teamsters Local Union No. 633, 671 F.2d 38, 42-44 (1st Cir.), cert. denied, 459 U.S. 943 (1982); Reid Burton Constr., Inc. v. Carpenters Dist. Council

of S. Colo., 614 F.2d 698, 702 (10th Cir.), cert. denied, 449 U.S. 824 (1980); E.T. Simonds Constr. Co. v. Local 1330, Int'l Hod Carriers, 315 F.2d 291, 295 (7th Cir. 1963). They may ask a court to resolve the contract-interpretation dispute instead. These cases demonstrate that LMRA § 301 pre-emption (unlike NLRA §§ 7 and 8 pre-emption) concerns what law a decision maker must apply, not what forum must decide the dispute. Given the typically more local impact of decisions of the former, 301 kind of case (compared with the typically more important NLRA § 7 or a kind of case), one can understand that is so. Regardless, the Davis court made clear that its holding does not govern choice-of-law questions.

Third, the weight of court of appeals authority tends to support us and

seems contrary to Westvaco's view. The Ninth circuit, in Johnson v. Armored Transport of California, Inc., 813 F.2d 1041 (9th Cir. 1987) (Wallace, J.), concluded that § 301 pre-emption (in the Supreme Court's terminology) was a matter of what law ought not to apply (namely, federal collective-bargaining-agreement law or state tort law) rather than of what forum ought (or ought not) to apply it. Consequently, it held that the parties could waive the defense, and that they did not possess an absolute right to raise it for the first time on appeal. Id. at 1043-44. Similarly, the Sixth and Seventh Circuits have held that a defendant may raise a § 301 pre-emption argument for the first time on appeal in special circumstances, thereby holding that the claim is not one that parties

had an absolute right to raise at any time. See Apponi v. Sunshine Biscuits, Inc., 809 F.2d 1210, 1215 (6th Cir.), cert. denied, 484 U.S. 820 (1987); National Metalcrafters, Div. of Keystone Consol. Indus. v. McNeil, 784 F.2d 817, 825-26 (7th Cir. 1986).

Westvaco says that two other Ninth Circuit cases hold the contrary, namely that the defense is not waivable, that parties have an absolute right to raise it at any time. Harris v. Alumax Mill Products, Inc., 897 F.2d 400, 402 (9th Cir.) (Wallace, J.), cert. denied, 111 S. Ct. 102 (1990); Stallcop v. Kaiser Foundation Hospitals, 820 F.2d 1044, 1048 (9th Cir.), cert. denied, 484 U.S. 986 (1987). But that is not what these cases hold. We agree that both cases use the protean word "jurisdiction." But,

neither case involved waiver; both cases dealt with the question whether the district court had properly held that § 301 preempted the plaintiff's state-law claim, and whether there was a sufficient basis for "arising under" jurisdiction after removal. Indeed, Judge Wallace, the author of Harris, also wrote Johnson (the case we discussed at p. 22, supra, holding directly against Westvaco), yet he suggested no contradiction between the two.

Westvaco also points to a Third Circuit case, Carpenters Health and Welfare Fund of Philadelphia and Vicinity v. Kenneth R. Ambrose, Inc., 665 F.2d 466 (3d Cir. 1981), in which the court said that "if the issue of pre-emption were not jurisdictional, a strong case for waiver could be made on [the] facts."

Id. at 469-70. Yet, this single sentence, dicta in context, made without analysis, in respect to a matter that the parties perhaps did not argue (the case involved other issues), makes that case weak support for Westvaco's claim.

Finally, Westvaco directs our attention to a recent Supreme Court case, Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478 (1990), in which the Court reversed a judgment from the Texas Supreme Court that had held that ERISA did not preempt the tort action under Texas law before it. Westvaco says that the Texas Supreme court raised the pre-emption issue on its own, and that the United States Supreme Court never stopped to consider if the defendant had waived the pre-emption defense by failing to raise it below. Hence, Westvaco says,

ERISA pre-emption (which, it says, is like § 301 pre-emption) must be a matter that the parties can raise at any time.

The short answer to this argument is that the Supreme Court never discussed waiver; and we do not normally take Supreme Court opinions to contain holdings on matters the court did not discuss and which, presumably, the parties did not argue. See Cousins v. Secretary of the U.S. Dep't of Transp., 880 F.2d 603, 608 (1st Cir. 1989) (en banc). Moreover, the respondent in the Supreme Court was free to waive application of the waive-or-raise rule itself. In fact, if one examines pre-emption by ERISA, one finds that the cases generally hold that ERISA pre-emption is a waivable defense. See, e.g., Dueringer v. General Am. Life Ins.

Co., 842 F.2d 127, 130 (5th Cir. 1988); Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488, 1497 (9th Cir. 1986).

For these reasons, we agree with the Ninth Circuit and with what we take as the holding implicit in the approach of the Sixth and Seventh Circuits, namely, that in an appropriate case, a party can waive § 301 pre-emption; the parties do not have an absolute right to raise that argument at any stage they wish in the proceedings.

Westvaco has one further important argument. it says that even if a party, by not raising the pre-emption defense, can waive it, courts sometimes forgive and overlook a failure to raise a legal issue at the proper time. They may make an exception and consider the matter anyway. And, Westvaco adds, a court

should prove more willing to make an exception from the normal waiver rule when a § 301 pre-emption question is at issue than in the ordinary case.

Westvaco may well be right on this point. The Sixth Circuit reached, and decided, a pre-emption question where it might otherwise have found waiver because of the "compelling policy in favor of uniform application of federal law in actions to enforce labor contracts . . ." Apponi, 809 F.2d at 1215. The Seventh Circuit did the same while referring to a host of special circumstances that made the exception proper, such as the appellant's having raised a very similar issue in the district court, and tardiness not having prejudiced the parties. See National Metalcrafters, 784 F.2d at 825-26.

Even on so favorable an assumption, however, Westvaco cannot prevail here, for the circumstances simply do not call for an exception. Westvaco could have raised pre-emption at any point before the jury deliberated. There is no good reason for its neglect. The unfairness is obvious and aggravated here, by the fact that, at least arguably, Mrs. Sweeney might have tried to reshape her case to avoid any need for contract interpretation had she known of the problem sooner.

At the same time, the risk that calls for pre-emption -- the risk that terms in the bargaining agreement will take on different meanings under state and federal law -- here is fairly minimal. Cf. Local 174, Teamsters of Am. v. Lucas Flour Co., 369 U.S. 95, 104

(1962) (describing the disruptive effect on labor negotiations if parties had to choose words designed to achieve similar meanings where "two or more systems of law . . . might someday be invoked in enforcing the contract."). The case in its present posture does not offer a specific interpretation of any word contained in the relevant collective bargaining agreement. Nor is there the slightest indication that any third party, any other worker, any union, any employer, is adversely affected by any collective bargaining agreement interpretation here at issue.

For these reasons, even taking a very lenient view of what constitute "unusual," waiver-excusing, circumstances (in light of the federal labor-law policies at issue), we cannot find such

circumstances present. We are not prepared to overlook Westvaco's failure to raise the pre-emption issue in a timely way in the district court. Thus, we find that it has waived its right to assert pre-emption.

IV

Diversity Jurisdiction

During these appellate proceedings, Westvaco for the first time pointed out that one of the individual defendants, Ronzoni, was at all relevant times a citizen of Massachusetts. Since the plaintiff, Dolores Sweeney, was also, and, presumably, still is, a citizen of Massachusetts, there is no diversity of citizenship between these two parties. And, this fact -- lack of "complete diversity" between the parties -- deprives the federal courts of

jurisdiction over the lawsuit. Strawbridge v. Curtiss, , U.S. (3 Cranch.) 267 (1806). Despite the surprisingly late hour at which anyone noticed the jurisdictional defense, we cannot proceed in the absence of diversity jurisdiction, and no one has pointed to any other basis for jurisdiction available in this case.

The plaintiff has asked us, however, to dismiss Ronzoni from the case. The Supreme Court has made clear that appellate courts possess power analogous to the power of district courts under Fed. R. Civ. P. 21 to dismiss nondiverse parties in order to maintain jurisdiction, see Newman-Green, Inc., v. Alfonzo-Larrain, 109 S. Ct. 2218, 2225-26 (1989), though the Court has also advised us to exercise that power sparingly" and

to "consider whether the dismissal of a nondiverse party will prejudice any of the parties in the litigation." Newman-Green, 109 S. Ct. at 2226.

We believe that this is an appropriate case for exercise of the power to dismiss a nondiverse party. The presence of Ronzoni in this suit has given the plaintiff no significant procedural advantage she could not have obtained without him. Even without Ronzoni's presence as a party, Mrs. Sweeney could have conducted the same discovery, called Ronzoni as a witness, and introduced all the evidence that, in fact, she presented to the jury. Cf. Newman-Green, 109 S. Ct. at 2226 (court must take into consideration whether opponent was able to obtain discovery materials that would not have been

available without the diversity spoiler); Levering & Garrigues Co. v. Morrin, 61 F.2d 115, 121 (2d Cir. 1932), aff'd, 289 U.S. 103 (1933) ("there is authority for allowing the record to stand as already taken, and to enter a decree thereon against the [remaining defendants], provided it appears that all the evidence remains equally admissible with the dismissed defendants out").

Westvaco makes two contrary arguments. First, it says that, the Supreme Court's decision in Newman-Green notwithstanding, this court lacks the power to dismiss Ronzoni from the suit. It bases its argument upon the language of the removal statute. (The reader will recall that Westvaco removed this case from state to federal court.) This language says that

> [i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

28 U.S.C. S 1447(c) (emphasis added). The word "shall," in Westvaco's view, means that we must remand this case to state court; we cannot dismiss the non-diverse party and keep the case.

We find this argument unpersuasive, for we see no reason why Congress, in using the word "shall," would have intended to deprive a federal court of the power to apply Rule 21, or any other federal rule or other ordinary procedural power. One would expect the removal statute to foresee a case removed to federal court as there being subject to the federal court's ordinary procedural power. And, linguistically speaking, one can easily read the statutory sentence in

question as meaning "lacks subject matter jurisdiction after federal courts have appropriately exercised any or all appropriate procedural powers including the power to add, or drop, other parties." Indeed, a later part of the removal statute, § 1447(e) (requiring remand when the district court, for example, wishes to add a nondiverse party), foresees exercise of the court's Rule 21 power to add parties, and thereby implies the related power to drop them. The history of the removal provision suggests that Congress added the mandatory word "shall" for an unrelated purpose, namely to make clear that the court must remand, not dismiss, a removed suit that it lacks power to hear. (The predecessor of § 1447(e) gave a federal court the option to dismiss the suit or

remand it to the court from which it was removed as justice may require. " See Act of March 3, 1875, ch. 137, § 5, 18 Stat. 472 (emphasis added).) Nothing in that history reflects any intent to deprive courts of the authority to apply other potentially applicable rules of procedure.

Westvaco's second argument is that it is unfair to dismiss Ronzoni but keep the verdict because, without Ronzoni in the case, the jury might not have returned so large a verdict. It might have thought it unfair of Mrs. Sweeney to sue only the company and not the actual perpetrator of her husband's suffering. Such a consideration, however, is speculative. one can, as easily, argue that the jury, seeing Ronzoni present and available as a target for its verdict,

would have proved less likely to return so large a verdict against Westvaco. We do not believe that so speculative a consideration offers a determinative reason for refusing to exercise the authority that the Supreme Court, in Newman-Green, has held that we possess.

Given the facts that the parties had the legal power to try this case as a simple tort suit, that Westvaco (until it lost) chose to do so, that plaintiff spent considerable time, effort, and expense in gaining victory, we believe it fair to hold the parties to the legal theories they asserted in this case prior to the jury's award. We have the legal power to require this result. And, we have exercised that power.

The defendant Ronzoni is dismissed from this action. The judgment of the

Magistrate Judge is vacated. The case is remanded with instructions to reinstate the jury's verdict against the other defendants.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

DOLORES SWEENEY	)	
	)	
V.	)	C.A. NO.
	)	86-0106-F
WESTVACO COMPANY, ET AL	)	

MEMORANDUM AND ORDER REGARDING
MOTION FOR
JUDGMENT N.O.V. OR FOR NEW TRIAL[1]

January 24, 1990

PONSOR, U.S.M.

I. INTRODUCTION.

In this diversity case a jury returned a verdict for plaintiff for $1.5 million for loss of consortium, based upon its finding that the defendants

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[1] The parties to this action have waived their right to proceed before a judge in the United States District Court and consented to have this magistrate conduct any and all further proceedings in the case, including the trial, and order the entry of judgment. 28 U.S.C. § 636(c).

negligently inflicted emotional distress on her husband. Defendants have now moved for judgment n.o.v. on the ground that this suit is preempted by § 301 of the Labor Management Relations Act, or in the alternative for a new trial. Barring judgment or new trial, they seek to have the court remit a portion of the damages. After considerable thought, the court has reluctantly concluded that the motion for judgment n.o.v. must be allowed.

II. FACTS AND PROCEDURAL BACKGROUND.

Many of the facts were hotly contested at trial. However, viewed in the light most favorable to the plaintiff, the background is as follows. Plaintiff's husband George Sweeney ("Sweeney") worked for the defendant, Westvaco Corporation ("Westvaco"), for 28 years. He was hired in 1955 in

Massachusetts, and advanced to the position of head adjustor by 1966, working at Westvaco's Enfield, Connecticut plant. In this position he oversaw the proper operation of a number of envelope machines. Occasionally, he served as "acting foreman," but he declined the position in a permanent capacity because he wished to stay with his wife at night. In 1977, Sweeney lost four fingers on his right hand in an accident, and in 1979 he suffered a back injury that required therapy and bed rest. Despite these physical obstacles, Sweeney continued regularly to work overtime as needed.

In December 1983, defendant Louis Ronzoni (hereinafter "Ronzoni") requested that Sweeney work mandatory overtime, but Sweeney refused because his back injury

was flaring up. It is undisputed that Ronzoni was acting in his proper role in making the request and that the request was made in the proper manner. Pursuant to the terms of the collective bargaining agreement then in place, Ronzoni gave Sweeney his first written warning. Sweeney had no previous oral or written warnings in his 28 years of service with Westvaco and was distressed to receive this one.

Sweeney's refusal of mandatory overtime and receipt of a warning was the beginning of the end. Sweeney was sensitive to the fact that the written warning was the first stage in a series of sanctions that could lead eventually to termination, and concerned that his back problem might compel him to continue refusing mandatory overtime. He became

increasingly anxious at work. He offered to obtain a medical certificate from a doctor to prove his back injury prevented him from working shifts in excess of eight hours and also proposed, as an alternative, to work voluntarily an extra eight hour stint on Saturday. According to plaintiff's evidence, defendants Ronzoni, Richard LaFarge ("LaFarge") and Lorenzo Sanchez ("Sanchez") --Sweeney's immediate supervisors -- refused this offer, although LaFarge acknowledged having accepted medical excuses from other employees in the past.

Later, the defendant's safety officer, Robert Lucas, requested that Sweeney, in front of one of his crews, demonstrate his competency in operating a piece of machinery without hurting his back. Although Lucas as safety officer

was empowered to make the request, Sweeney felt humiliated. Between January 26, 1984 and May 1984, defendants urged Sweeney and his crews to operate their machines at a faster pace. The attempts of Sweeney and his men to comply caused the machines to break down often. As a result, defendants criticized and chided Sweeney on the floor. Again, Sweeney was acutely embarrassed by this public disparagement of his work and worried about his job security.

In May 1984, the plaintiff, Dolores Sweeney ("plaintiff"), contacted Charles Hill, a vice president of the defendant corporation, regarding LaFarge's refusal of Sweeney's medical certificate. Hill ordered the defendants to accept the certificate. Some time later a written

medical certificate was actually offered for the first time and accepted.

At this point, defendants' demands for overtime halted, but verbal harassment of Sweeney by his immediate supervisor began instead. Plaintiff's counsel argued to the jury that the badgering was in retaliation for Dolores Sweeney's going over the supervisors' heads. In addition, the defendants gave Sweeney and his crew the oldest machines to work on. The slowest workers were transferred to his crews. As a result, Sweeney's crews operated at an efficiency rate of 87.5%, as compared with the 92.1% and 94.1% efficiency rates of the crews with newer machines. The pressure caused Sweeney to become even more unhappy and preoccupied.

On or about October 19, 1984, defendant Ronzoni called Sweeney to his office and told him he was "all done," implying that he had been fired. Sweeney was shocked into anguished silence at this news. After some minutes, Ronzoni told Sweeney that he had only been transferred to the tool crib, a reassignment commonly understood to be a demotion. Again, it is undisputed that the demotion was within Ronzoni's sphere of discretionary responsibility under the terms of the applicable collective bargaining agreement.

On October 22, 1984, following the weekend, Sweeney arrived for work at Westvaco and attempted to carry out his new responsibilities in the tool crib. But he soon became emotionally distraught and returned home. Minutes thereafter,

Sweeney collapsed and suffered a complete nervous breakdown. As a result, he was left in a condition of emotional disintegration and helplessness compared by one of plaintiff's experts to Alzheimer's disease. It is essentially uncontested that Sweeney's breakdown caused substantial damage to his marital relationship with the plaintiff.

As noted, Sweeney was a party to a labor contract between the Union and Westvaco. This collective bargaining agreement contained provisions governing the rights and liabilities of the parties. The agreement included grievance procedures which established remedies for employee disputes.

Article III provided several levels through which an employee might pass to attempt to settle a dispute or grievance

with his employer. The final level called for arbitration under the standard terms set forth by the American Arbitration Association, with the arbitrator's decision to be binding upon the parties. Article III specified the exact number of working days within which a grievance had to be submitted to the following level, as well as the number of working days within which the decision at each level would be conveyed to the employee. It is undisputed that George Sweeney never invoked these grievance procedures.

Of particular significance, in addition, was Article VIII, entitled "Management." This paragraph stated that "[n]othing in this Agreement shall limit the company in the exercise of its function of Management, under which it

shall have among others, the right to . . . discipline. . . ." Article VIII also provided broadly that management prerogatives not specifically enumerated were not deemed to be excluded, so long as these prerogatives were not inconsistent with the contract.

On March 13, 1986 plaintiff filed suit in Massachusetts Superior Court for loss of consortium. Subsequently, the action was removed to this court on the basis of diversity of citizenship. Discovery was completed and the jury trial commenced on July 19, 1989 before this magistrate. This motion was briefed and argued thereafter.

As noted, the complaint asserted the plaintiff's loss of consortium based upon the defendants' negligent and/or intentional infliction of emotional

distress on her husband. The jury found for defendants on the loss of consortium claim based on the intentional infliction of emotional distress claim, but for the plaintiff on the loss of consortium claim based on negligent infliction of emotional distress, awarding damages of $1.5 million.

Before submission of the case to the jury, the defendants submitted Supplemental Requested Instruction Number 2 which stated:

> If the conduct of defendants Westvaco Corporation, Richard LaFarge, Louis Ronzoni, and Lorenzo Sanchez toward George Sweeney was in accordance with the provisions of the Guidelines for Filling Overtime Needs adopted pursuant to the collective bargaining agreement, then you must find for the defendants in this case. Conduct in accordance with the terms of a collective bargaining agreement cannot provide the basis for a claim of intentional and/or negligent infliction of emotional distress.

This court declined to give the instruction as worded because the court felt at the time that the issue was covered adequately by other, more general language in the instructions describing plaintiff's burden of proving that defendants acted unreasonably. Also -- again, in the court's view at the time -- the mere fact that some of the conduct of the defendants fell under the broad framework of their responsibilities as supervisors would not save them from liability if the jury found their behavior otherwise satisfied the criteria for negligent or intentional infliction of emotional distress.

Until the defendants explicitly raised the issue of federal labor law preemption in their current motion, this court was not put on notice of any

preemption issue. The defendants never used the word "preemption", nor referred to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("§ 301"), before filing this motion.

The defendants contend now that federal labor law preempts plaintiff's claim because defendants' conduct was pursuant to the terms of a collective bargaining agreement and therefore exclusively a matter of federal labor law. Defendants argue that this issue was properly preserved, though, they concede, in muffled form. Alternatively, they point to decisional authority that equates preemption with lack of subject matter jurisdiction, which cannot be waived even if it is not raised.

Defendants assert that if the doctrine of preemption bars the

employee's claim, then it must also preclude a spouse's claim for loss of consortium. No matter who brings the claim, defendants say, it is the same actions of the employer which must be examined, as well as the same terms of the labor agreement.

Plaintiff argues that defendants' failure to preserve this issue was fatal. Substantively, she responds that her complaint is based solely on the particularly abusive manner in which her spouse was treated. She contends that no interpretation of the labor contract is needed to evaluate the sufficiency of this claim. since her complaint does not require interpretation or application of any provision of the collective bargaining agreement, she contends it

does not implicate federal labor law and is not preempted.

Moreover, plaintiff points out that the Commonwealth of Massachusetts has a substantial interest in protecting its citizens from the degrading conduct the jury found here. She contends that the doctrine of preemption should not be applied where the state has a valid interest in protecting its citizens.[2]

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[2] This argument is somewhat ironic. The Massachusetts Supreme Judicial Court held in Ferriter v. O'Connell's Sons, 381 Mass. 507 (1980), that the Commonwealth's workers compensation statute, while it barred an employee from suing his employer for work-related injuries, did not bar a spouse from suing the employer for loss of consortium based upon injury to the employee. This judicially-created "window" was closed by the Massachusetts legislature by amendment to Mass. Gen. Laws ch. 152, § 24. Actions such as the plaintiff's here are now no longer permitted.

III. DISCUSSION.

A. Preservation.

The oblique references made by defense counsel during the trial to the collective bargaining agreement would be insufficient to preserve the issue of federal labor law preemption, were preservation essential. Defendants' counsel has frankly conceded that the issue could have been raised more vividly, though he points to Supplemental Instruction Number 2, quoted above, as a sufficient effort to breathe life into the point.

To expect the court to infer an argument of preemption from this instruction is like asking it to conjure up a bald eagle from a pigeon feather. Both in terms of quantity and quality, this hint was not enough. If the court

were persuaded that the normal rules requiring adequate preservation of an objection during trial applied in this instance, it would not hesitate to deny the defendants' motion for judgment notwithstanding the verdict.

A review of the decisional law, however, convinces the court that the normal rules of preservation do not apply. In Carpenters Health and Welfare Fund of Philadelphia and Vicinity v. Ambrose, 665 F.2d 466 (3rd Cir. 1981), the issue of federal labor law preemption was never raised until the case reached the Third Circuit. Nevertheless, the Court of Appeals held that the issue of preemption implicated subject matter jurisdiction and could not be waived. Id. at 470. Similarly, Stallcop v. Kaiser Foundation Hospitals, 820 F.2d

1044, 1048 (9th Cir. 1979) -- a case, like this, involving claims of intentional and negligent infliction of emotional distress -- flatly stated that "preemption . . . is a question of subject matter jurisdiction, reviewable de novo." See also National Metalcrafters v. McNeil, 784 F.2d 817, 826 (7th Cir. 1986). Despite the defendants' failure to preserve the issue, therefore, preemption must be addressed now.

B. Preemption -- General.

The recent First Circuit decision, Securities Industry Association v. Connolly, 883 F.2d 1114 (1st Cir. 1989), sets forth with helpful concision the principles underlining the doctrine of preemption. The purpose of the principle is to prevent states "from impinging overmuch on federal law and policy." Id.

at 1117. Growing out of Article VI of the Constitution, the question of possible preemption "always boils down to a matter of congressional intent." Id. Sometimes a statute itself may define the extent of state and local law preempted; sometimes, as in this case, the preclusive intent of federal legislation must be inferred. While it is certainly true that state law will be preempted when an actual conflict exists with federal law, "a direct, facial contradiction between state and federal law is not necessary to catalyze an 'actual[] conflict' within the doctrinal parameters of the Supremacy Clause." Id. at 1118.

The First Circuit has used various phrases to attempt to guide the district courts in determining when a state law

will be preempted. Thus, preemption is properly invoked if "the state law disturbs too much the congressionally declared scheme Palmer v. Liggett Group, 825 F.2d 620, 626 (1st Cir. 1987); or where "the effect which the challenged enactment will have on the federal plan" is too great, French v. Pan Am Express, 869 F.2d 1, 2 (1st Cir. 1989); or where the state law or regulation "looms as an obstacle to achievement of the full purposes and ends which Congress has itself set out to accomplish." Securities Industry Association at 1118.[3]

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[3] Based on its analysis the First Circuit found in Securities Industry Association that state regulations limiting use by brokers of pre-dispute arbitration agreements were preempted by the Federal Arbitration Act, 9 U.S.C. §§ 1-14.

C. Preemption -- The Labor Law Context.

An appropriate beginning of any survey of federal labor law preemption is the Supreme Court's decision in Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957). In that case, a labor union sued to enforce an arbitration provision contained in a collective bargaining agreement. The question addressed was whether § 301 of the LMRA was merely jurisdictional or whether the statute constituted an authorization by Congress for district courts to develop a body of federal law for application in the labor context. Justice Douglas stated emphatically that § 301 "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements . . ." Id. at 451.

The Lincoln Mills holding has become the Golden Rule of LMRA jurisprudence.

Two years later the Supreme Court took up the question of preemption in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). In that case the union had engaged in peaceful picketing of a lumber business. The business, contending that the picketing was an unfair labor practice, went to the National Labor Relations Board ("NLRB"), which declined jurisdiction. Thereafter, the lumber company went into state court, still alleging unfair labor practices, and obtained an injunction against the picketing and an award of damages for injury to its business. The injunction was later vacated and the question before the Supreme Court in Garmon was whether the state court was preempted from

awarding damages growing out of a dispute arguably within the purview of the LMRA. In a comprehensive review of the statute's underpinnings and the interpretive case law, Justice Frankfurter affirmed "that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures and equipped with its specialized knowledge and cumulative experience . . . ." Id. at 242. Where the activity regulated "was a merely peripheral concern of the Labor Management Relations Act" or "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had

deprived the state of the power to act," there would be no preemption. However, when the regulated conduct is "plainly within the central aim of federal regulation," Id. at 244, even the award of damages would create too great a danger of improper interference with national policy. Id. at 246. Finding that the activity in question fell squarely within §§ 7 and 8 of the National Labor Relations Act, the Court reversed the state court's award of damages.

Four years later in Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962), the Court again recognized that the uniformity of federal labor laws must prevail over inconsistent local rules. The Court stated:

> Indeed, the existence of possibly conflicting legal concepts might

> substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.
>
> The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy.

Id., at 104.

In 1977 the Supreme Court decided Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, 430 U.S. 290 (1977). Because the case involves a claim of intentional infliction of emotional distress that the Supreme Court held was not preempted under federal labor law, the plaintiff here places great reliance upon it.

Farmer involved a state court action for intentional infliction of emotional distress by a union member against his union. After trial in state court, a jury awarded the plaintiff compensatory and punitive damages. The California Court of Appeal reversed the trial court on the ground that the crux of the action concerned employment relations and conduct subject to the jurisdiction of the NLRB. The Supreme Court reversed. The Court held that there was no federal protection for the conduct of union officers that is so outrageous that "no reasonable man in a civilized society should be expected to endure it." Id. at 302.

At least four considerations, however, drain Farmer of its precedential impact upon the present law suit. First,

Farmer involved merely the question of the jurisdiction of the NLRB. Section 301 of the LMRA was not at issue. Second, as a corollary to the previous consideration, the suit was not against an employer, but against the union. Third, the decision appears to turn on the claim of intentional (and not, as here, merely negligent) infliction of emotional distress. Justice Powell stated:

> Our decision rests . . . on our understanding that California law permits recovery only for emotional distress sustained as a result of "outrageous" conduct. The potential for undue interference with federal regulation would be intolerable if state tort recoveries could be based on the type of robust language and clash of strong personalities that may be commonplace in various labor contexts.

Id. at 305-306.

Here, of course, the jury explicitly found that plaintiff had failed to carry her burden of proof with regard to intentional infliction of emotional distress and returned a verdict solely on negligent infliction.

Fourth, and finally, the Supreme Court's later decision in Allis-Chalmers v. Lueck, 471 U.S. 202 (1985) -- at least in the view of many courts -- has made Farmer inapplicable to § 301 preemption analysis. This point will be expanded below.

The Supreme Court's Allis-Chalmers decision in 1985 was the first in a wave of decisions ultimately fatal to the plaintiff's claims here. Roderick S. Lueck was a union member subject to a collective bargaining agreement that incorporated a separately negotiated

group health and disability plan. When he applied for disability benefits, the defendants, he alleged, committed a breach of the duty of good faith and fair dealing by refusing or delaying benefit payments. He sued both the insurer and his employer in state court; the Supreme Court ultimately held unanimously that his suit was preempted by § 301. Justice Blackmun noted that under Wisconsin law the parties to an insurance contract are free to bargain about what constitutes "reasonable" performance of contract obligations. He concluded:

> That being so, this tort claim is firmly rooted in the expectations of the parties that must be evaluated by federal contract law.
>
> Because the right asserted not only derives from the contract, but is defined by the contractual obligation of good faith, any attempt to assess liability here inevitably will

> involve contract interpretation. The parties' agreement as to the manner in which a benefit claim would be handled will necessarily be relevant to any allegation that the claim was handled in a dilatory manner.

Id. at 217-219. (Footnotes omitted.) As a second basis for his holding, Justice Blackmun found the state tort action to be inconsistent with the central role of arbitration in labor relations.

> Since nearly any alleged wilful breach of contract can be restated as a tort claim for breach of a good faith obligation under a contract, the arbitrator's role in every case could be bypassed easily if § 301 is not understood to preempt such claims. Claims involving vacation or overtime pay, work assignment, unfair discharge -- in short, the whole range of disputes traditionally resolved through arbitration -- could be brought in the first instance in state court by a complaint in tort rather than in contract. A rule that permitted an individual to sidestep available grievance procedures

> would cause arbitration to lose most of its effectiveness . . . as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance.

Id. at 219-220. (Emphasis supplied.)

Following Allis-Chalmers, a number of federal courts concluded that "the Farmer test . . . no longer applies in § 301 cases." Jackson v. Southern California Gas Company, 881 F.2d 638, 646 (9th Cir. 1989). See also Newberry v. Pacific Racing Association, 854 F.2d 1142, 1149 (9th Cir. 1988); Hyles v. Mensing, 849 F.2d 1213 (9th Cir. 1988).

A few months after the Allis-Chalmers decision, the Ninth Circuit, in a decision virtually on all fours with the current case, Truex v. Garrett Freightlines, 784 F.2d 1347 (9th

Cir. 1985), concluded that claims of emotional distress in the workplace based upon improper warning letters and harassment by supervisors were preempted by § 301.

The Supreme Court underlined the preemptive impact of § 301 in Electrical Workers v. Hechler, 481 U.S. 851 (1987). There, the Court concluded that a tort law claim alleging breach of the employer's duty to provide a union member with a safe workplace was preempted by § 301.

The most recent decision in this area, Lingle v. Norge Division of Magic Chef, 108 S. Ct. 1877 (1988), resulted in vindication of the plaintiff in that case, but with language damaging to plaintiff's position here. The plaintiff in Lingle brought suit in state court in

Illinois alleging a wrongful discharge based upon her attempt to claim workers compensation. The state court threw out the case on the ground that the claim for retaliatory discharge was "inextricably intertwined" with the collective bargaining process and was therefore preempted by § 301. Id. at 1879. The Supreme Court unanimously reversed.

Justice Stephens began by distinguishing Allis-Chalmers, noting that the duty upon the insurer in that case to make timely benefits could only be "ascertained from the consideration of the contract itself." Id. at 1881. He noted that "if the resolution of a state law claim depends upon the meaning of a collective bargaining agreement" the application of state law is preempted. Id. Contrasting the plaintiff's

situation in Lingle, Justice Stephens observed that proof of retaliatory discharge only required the plaintiff to demonstrate first that she was discharged and second that the motive in discharging her was to deter exercise of the right to workers compensation. The court concluded:

> Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of the collective-bargaining agreement. To defend against a retaliatory discharge claim, an employer must show that it had a non-retaliatory reason for the discharge . . .; this purely factual inquiry likewise does not turn on the meaning of any provision of a collective-bargaining agreement. Thus, the state-law remedy in this case is "independent" of the collective-bargaining agreement in the sense of "independent" that matters for § 301 preemption purposes: resolution

> of the state law claim does not require construing the collective-bargaining agreement.

Id. at 1882. (Citation and footnote omitted.)

The Lingle formulation was applied by the First Circuit in the case of Jackson v. Liquid Carbonic Corp., 863 F.2d 111 (1st Cir. 1988). In that case, an employee sued his employer in state court for invasion of privacy, following the employer's inauguration of a drug testing program on the supposed authority of the collective bargaining agreement. Judge Selya stated:

> Our preemption inquiry begins with the question Lingle requires us to ask: can Jackson's privacy claim be made out without interpreting the Agreement? We conclude that it cannot.

Id. at 114-115.

> The court found that the collective bargaining agreement

> . . . provides the context in which an employee's bona fide expectations of privacy and personal security in the workplace are arrayed against the employer's right to exercise supervision and control of a particular kind. In that context, reasonableness almost always requires investigation of the terms of the collective bargaining agreement. Id. at 119.

The court concluded that since the plaintiff's privacy claims "appear inseparable from an interpretation of what is or is not 'reasonable' under the labor contract," they were barred by § 301.

D. Preemption -- Intentional or Negligent Infliction of Emotional Distress.

It is worth noting at the outset the strong existing authority holding that suits for intentional or negligent infliction of emotional distress in the workplace are preempted by § 301. The

Truex case, in the Ninth Circuit, noted above, although a pre-Lingle case, found preemption on facts virtually identical to those in question here.

More recently, the Seventh Circuit -- in a case involving, if anything, facts stronger than those presented by plaintiff here -- held a claim for intentional infliction of emotional distress to be preempted by § 301. In Douglas v. American Information Technologies Corp., 877 F.2d 565 (7th Cir. 1989), the plaintiff brought suit in an Illinois state court claiming intentional infliction of emotional distress based upon conduct by her employer taken against her in retaliation for her refusal to do overtime work. Plaintiff maintained, inter alia, that the defendant employer arbitrarily denied

her relief days, subjected her to constant harassment, denied her the right to visit her doctor, gave her an unjustified final warning, threatened to fire her if she took a day off for any reason (including a doctor's appointment) and subjected her to unwarranted and excessive scrutiny of her work. The district court dismissed the lawsuit based upon § 301 preemption and the Seventh Circuit affirmed. The court concluded:

> In Lingle, the Court concluded that analysis of the elements of the plaintiff's retaliatory discharge claim did not require a court to interpret any terms of a collective bargaining agreement. However, analysis of an employee's intentional infliction of emotional distress claim may well require a court to refer to and interpret the contract provisions governing the terms and conditions of her employment. Specifically, a court's determination of

> whether the defendant's allegedly wrongful conduct was "extreme and outrageous" may turn on the meaning of various provisions of the collective bargaining agreement.

Id. at 571.

To take one example, the Seventh Circuit noted that a trial court could not determine whether a warning was justified "without first determining what sort of warning or level of scrutiny the parties have agreed is justified or warranted." Id. at 572.

The court further noted that "the fact that a particular provision of the collective bargaining agreement may not explicitly address the conduct underlying [plaintiff's] complaint does not mean that resolution of an intentional infliction of emotional distress claim does not require interpretation of the agreement." Id.

Significantly, plaintiff in her brief has made no attempt to distinguish either the Truex or Douglas decisions. Nor has she offered any contrary decisional law.

Leaving aside this persuasive authority, this court must agree that evaluation of the elements of a claim for negligent infliction of emotional distress requires reference to the underlying collective bargaining agreement no less than the analysis of a claim of intentional misconduct. A claim for negligent infliction of emotional distress contains five elements: negligence, distress, causation, physical harm manifested by objective symptomatology and reasonableness in the plaintiff's reaction to the negligent

conduct. Payton v. Abbott Labs, 386 Mass. 540, 557 (1982).

The very first element of the plaintiff's cause of action, negligence, necessarily requires scrutiny of the reasonableness of defendants' conduct under the circumstances. As the First Circuit noted in the Jackson case, assessment of the reasonableness of an employer's actions in the workplace almost inevitably demands some interpretation of the applicable rules of that workplace.

Here, the actions complained of by the plaintiff were submerged, at the time the actions were taken, in the complex of interrelationships in the workplace environment. The initial warning, for example, was issued pursuant to specific written guidelines. The significance of

the alleged bad faith refusal to accept the medical certificate implicates the rules of the workplace. The conduct of the safety engineer, the supervisors, demands for greater speed and the plaintiff's husband's eventual demotion and transfer can only be viewed through the lens of the collective bargaining agreement.

Under these circumstances, the court has no alternative but to conclude that the claim for negligent infliction of emotional distress is preempted by § 301.

E. Preemption -- Loss of Consortium.

Plaintiff argues that, even if her husband's claims are preempted by § 301, she may still pursue an action for loss of consortium, since such an action is independent of the claim of her injured spouse. Unfortunately, this conclusion

is supported by neither common sense nor caselaw.

The lengthy recitation of Supreme Court and other authority set forth above makes it clear that the purpose of the preemption doctrine is to ensure the consistency of policy in the field of labor relations. While colorable arguments can be made with regard to whether one state law cause of action or another -- say, a claim for retaliatory discharge versus a claim for negligent infliction of emotional distress -- should be preempted, once preemption is found to be necessary, logic and policy dictate that the door be tightly shut.

The argument that a cause of action for negligent infliction of emotional distress might be preempted under § 301, while a claim for loss of consortium

based upon the same employer conduct would not, simply disintegrates against the granite wall of decisional authority beginning with Lincoln Mills. Exempting loss of consortium claims from preemption would inject into the labor relations area precisely the inconsistency that the preemption doctrine originally sought to eliminate. To the extent that Adkins v. General Motors Corp., 556 F. Supp. 452 (S.D. Ohio 1983), holds to the contrary, it is simply not good law on this point. Johnson v. Anheuser-Busch, 876 F.2d 620 (8th Cir. 1989), applying both Allis-Chalmers and Lingle in support of the conclusion that a loss of consortium claim cannot bootstrap a preempted cause of action, states the proper rule. If the underlying claim is preempted, the

loss of consortium cause of action must also be barred.

F. Preemption - Conclusion.

In the introduction to this Memorandum the court stated that it was granting defendants' motion for judgment n.o.v. "reluctantly." This sentiment bears repeating. The trial in this case was long and painful, particularly for the plaintiff and her husband. The court's decision now must obviously heighten that distress. A motion for summary judgment filed well before trial and based upon the Allis-Chalmers, Lingle, Truex, Douglas and Jackson cases would certainly have been allowed. Nevertheless, despite the court's frustration at the timing of this motion, it would be false generosity to the plaintiff now to pretend that the

controlling authorities are other than fatal to her cause of action.

IV. MOTION FOR NEW TRIAL AND MOTION TO REMIT THE DAMAGES

In order to present a reviewing court with the complete record, the court will rule on the defendants' motion for a new trial and the motion to remit the amount of damages awarded.

Assuming that the court's ruling as set forth above on the defendants' motion for judgment n.o.v. is incorrect, the motion for a new trial is denied. Absent preemption, the evidence was sufficient to support the jury in finding negligent infliction of emotional distress. Moreover, the evidence was sufficient to show causation and reasonableness in George Sweeney's reaction. The error alleged by the defendants in the conduct of the trial in permitting certain

cross-examination of the defendant Ronzoni, if it was error, was not prejudicial to the defendants.

Turning to the defendants' motion to remit a portion of the damages -- again assuming that the motion for judgment n.o.v. is determined to have been decided incorrectly -- that motion is hereby denied. Considering the length of the parties marriage, the nature of their relationship before and after George Sweeney's collapse and their ages at the time of trial, the court cannot say that the jury's verdict was "'grossly excessive', 'inordinate,' 'shocking to the conscience of the court' or 'so high that it would be a denial of justice to permit it to stand.'" MacDonald v. Federal Laboratories, 724 F.2d 243 (1st Cir. 1984), quoting Grunenthal v. Long

Island Railroad Company, 393 U.S. 156, 159 n.4 (1968). This case is not similar to recent circuit court decisions finding damage awards to be excessive. See, e.g., Marchant v. Dayton Tire & Rubber Co., 836 F.2d 695 (1st Cir. 1988) ($600,000 for a broken wrist), and Laaperi v. Sears Roebuck & Co., 787 F.2d 726 (1st Cir. 1986) ($750,000 for first and second degree burns on 12% of plaintiff's body).

V. ORDER.

To summarize, defendants' motion for judgment n.o.v. is hereby ALLOWED. The clerk is hereby ordered to enter judgment in favor of the defendants. To insure clarity, the court here indicates that if its ruling on the motion for judgment n.o.v. is found to be incorrect, the

motion for new trial and motion to remit are DENIED.

MICHAEL A. PONSOR
U. S. Magistrate

Supreme Court, U.S.
FILED
JUL 15 1991
OFFICE OF THE CLERK

(2)

No. 90-1727

In the
Supreme Court of the United States

OCTOBER TERM, 1990

WESTVACO COMPANY, RICHARD LAFFARGUE
AND LORENZO SANCHEZ,
PETITIONERS,

v.

DOLORES SWEENEY,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

WESTVACO COMPANY, ET AL.,
Petitioners,

v.

DOLORES SWEENEY,
Respondent

STATEMENT OF THE CASE

This is a diversity action tried under Massachusetts state tort law (App. A at 2a).[1] The respondent, plaintiff, Dolores Sweeney was awarded compensatory damages by a jury for loss of consortium

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[1]Reference herein to the opinion of the Court of Appeals for the First Circuit and to the decision of the United States District Court for the District of Massachusetts (Ponsor, U.S.M.) will be to Appendix A ("App. A") and Appendix B (App. B"), respectively, of petitioners' Petition for Writ of Certiorari which will be referred to hereinafter as "Pet. Cert.".

caused by the negligent infliction of emotional distress upon her husband George Sweeney by Westvaco Company ("Westvaco") and three of its supervisory employees (App. A at 6a).

George Sweeney worked for more than twenty-nine years for Westvaco (App. A at 6a). He had "overcome a background of adversity (birth defects, deafness in childhood, loss of a parent), to become, in his adulthood, a conscientious, kind, and dedicated employee, liked and respected by his coworkers." (App. A at 6a). Over a period of several months, George was "harassed, taunted, and humiliated" by the three supervisory employees (App. A at 8a). "[T]he evidence permitted the jury to find behavior of unusual callousness or cruelty." (App. A at 9a). George suffered a "serious emotional

breakdown" of dire and permanent consequences (App. A at 9a). Briefly, and starkly stated: "He cannot work or maintain ordinary human relationships. His wife has become, in effect, a caretaker (as one expert witness testified), like a wife with a husband who has Alzheimer's disease." (App. A at 9a).

This action was commenced in Massachusetts Superior Court against Westvaco. Westvaco removed the action to federal court on the basis of diversity of citizenship jurisdiction (App. A at 10a). Westvaco and two of the supervisors are petitioners here.[2] At the commencement

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[2]In federal court Dolores Sweeney added the three supervisory employees as defendants (App. A at 10a), one of whom, Louis Ronzoni, was dismissed from the case as a nondiverse party by the First Circuit under authority of Newman-Green, Inc. v. Alfonzo-Larrain, 109 S. Ct. 2218, 2225-26 (1989). (App. A at 46a-53a).

of the action in March 1986, Dolores and George Sweeney had been married for over thirty-five years. At the time of the trial in June 1989, Dolores Sweeney was fifty-seven years old and George Sweeney was sixty-one.[3]

After discovery was completed, "[i]n its pretrial memorandum, Westvaco told the court that the case raised 'no jurisdictional issues,' and it 'agreed with plaintiff's statement' that the case was a simple tort suit that did not present 'any unusual issues of law.'" (App. A at 23a-24a). Only after the jury returned a $1.5 million verdict for the plaintiff did Westvaco advance a defense of preemption under § 301 of the Labor Manage-

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[3]Brief and Addendum for the Plaintiff-Appellant Dolores Sweeney in the appeal before the First Circuit, hereinafter "Pl. Br. 1st Cir." at 2.

ment Relations Act, 29 U.S.C. § 185(a). (App. A at 3a-4a). "The Magistrate, who ruled on pretrial motions, conducted the trial, held a charge conference, and heard all the parties' arguments, wrote that Westvaco did not give 'notice of any pre-emption issue' until . . . Westvaco filed its motion for judgment notwithstanding the verdict." (App. A at 24a).

The Magistrate, believing that pre-emption under § 301 was "jurisdictional" and could be raised at any time, "reluctantly" allowed Westvaco's motion for judgment notwithstanding the verdict (App. B at 2b). The Magistrate, however, stated that if the normal rules of issue preservation were to be applied, the court "would not hesitate to deny" the motion (App. B at 17b-18b). In conclusion, the Magistrate was moved to add:

> In the introduction to this Memorandum the court stated that it was granting defendants' motion for judgment n.o.v "reluctantly." This sentiment bears repeating. The trial in this case was long and painful, particularly for the plaintiff and her husband. The court's decision now must obviously heighten that distress.

(App. B at 46b).

The First Circuit found it unnecessary to reach the merits of whether § 301 applied to the circumstances of this case. It found that the Magistrate was correct in finding that the defendants would ordinarily be deemed to have waived their pre-emption defense (App. A at 24a-25a). The court, however, rejected the Magistrate's conclusion that § 301 pre-emption was "jurisdictional" in the sense that it was not subject to waiver. Instead, the court concluded that "in an appropriate case, a party can waive § 301

pre-emption; the parties do not have an absolute right to raise that argument at any stage they wish in the proceedings." (App. A at 42a). The First Circuit vacated the Magistrate's judgment for the defendants and remanded with instructions to reinstate the jury's verdict for the plaintiff (App. A at 53a-54a).

In so holding, the First Circuit agreed with the Ninth Circuit, Johnson v. Armored Transport of California, Inc., 813 F.2d 1041 (9th Cir.1987), the Sixth Circuit, Apponi v. Sunshine Biscuits, Inc., 809 F.2d 1210, 1215 (6th Cir.), cert. denied, 484 U.S. 820 (1987), and the Seventh Circuit, National Metalcrafters, Div. of Keystone Consol. Indus. v. McNeil, 784 F.2d 817, 825-26 (7th Cir.1986). (App. A at 42a).

The court distinguished the Third Circuit case of Carpenters Health and Welfare Fund of Philadelphia and Vicinity v. Kenneth R. Ambrose, Inc., 665 F.2d 466 (3d Cir. 1981), which was relied upon as a contrary holding by the defendants. In Carpenters, the Third Circuit dismissed an appeal as premature, holding that the decision below was not final until attorney fees had been assessed. In dismissing, the Third Circuit simply stated that "if the issue of pre-emption were not jurisdictional, a strong case for waiver could be made on [the] facts." Id. at 469-70. The First Circuit found defendants' reliance on Carpenters misplaced. Rather, the court stated, "this single sentence, dicta in context, made without analysis . . . makes that case weak support for Westvaco's claim." (App. A at

40a). Petitioners persist, offering to this Court, Carpenters as a "directly contrary holding" (Pet. Cert. at 17), and as the case constituting a conflict in the circuits (Pet. Cert. at 26).

After concluding that § 301 pre-emption is subject to waiver, the First Circuit considered whether, upon the facts of this case, it would exercise its discretion to address an issue that had not been timely raised (App. A at 42a-46a). The court distinguished on the facts, not on principles of law, Apponi v. Sunshine Biscuits, Inc., supra, and National Metalcrafters, Div. of Keystone Consol. Indus. v. McNeil, supra, offered by the defendants as cases where "even if a party, by not raising the pre-emption defense, can waive it, courts sometimes forgive and overlook a failure to raise a

legal issue at the proper time." (App. A at 42a). The court found that it would be unfair in the instant case to relieve the defendants of their failure, "for the circumstances simply do not call for an exception." (App. A at 44a).

> Westvaco could have raised pre-emption at any point before the jury deliberated. There is no good reason for its neglect. The unfairness is obvious and aggravated here, by the fact that, at least arguably, Mrs. Sweeney might have tried to reshape her case to avoid any need for contract interpretation had she known of the problem sooner.

(App. A at 44a).

Chief Judge Breyer, writing for the court in a unanimous decision from which the petitioners did not seek rehearing (Pet. Cert. at 21), concluded:

> Given the facts that the parties had the legal power to try this case as a simple tort suit, that Westvaco (until it lost) chose to do so, that

> plaintiff spent considerable time, effort, and expense in gaining victory, we believe it fair to hold the parties to the legal theories they asserted in this case prior to the jury's award. We have the legal power to require this result. And, we have exercised that power.

(App. A at 53a).

The petitioners, having emotionally distressed, exhausted and judicially prejudiced the respondent, now seek to employ certiorari to rescue themselves from their own negligence in failing to raise, until after a jury verdict, the issue of the potential application of § 301.

SUMMARY OF ARGUMENT

I. The national labor policy favoring grievance-arbitration resolution of labor disputes is not implicated, much less threatened, by the First Circuit's decision. Petitioners' argument that the First Circuit's decision that § 301 is

subject to waiver allows respondent to "sidestep" national labor policy is without substance, because the First Circuit did not decide § 301 applied to the circumstances of the case at bar, and if there is any sidestepping here it is raised by the conduct of the petitioners, who having suffered an adverse verdict, and not having raised the question of the applicability of § 301 pre-emption until after the verdict, now seek to sidestep the rules of practice that govern litigation in the federal courts. The ruling below is consistent with both national labor policy and orderly judicial administration. The integrity of the policy is not undermined; all one need do is invoke by any one of the numerous opportunities afforded in the procedural and trial practice. In addition, the peti-

tioners had "no good reason for their neglect" and, in the circumstances of this case, "unfairness is obvious and aggravated here."

II. This case does not present the issue sought to be reviewed in the clear and unequivocal manner necessary for certiorari review. The petitioners, now in extremis, attempt to cast this matter simply as a labor-management case, endeavoring to posture it as a simple and clean question respecting the pre-emptive reach of § 301. The underlying facts and the decision of the First Circuit belie this. As a matter of simple justice, it cannot be said that harassment, taunting, and humiliation, "behavior of unusual callousness or cruelty," are rights of management under any labor agreement. Additionally, the First Circuit found it

unnecessary to reach the question of whether § 301 actually applied to the circumstances of this case. The petitioners' representation that "[t]he instant case presents this Court with an opportunity to address directly the issue of whether an otherwise valid assertion of § 301 preemption may be waived by a party or raised at any time" is an overstatement of the record.

III. This case is not appropriate for certiorari review as the judgment is supportable on the alternative grounds that: (1) The claim challenging defendants' conduct was not pre-empted, because it was "harassing, taunting, and humiliating" conduct, of "unusual callousness or cruelty," behavior that cannot reasonably be within the rights of an employer under any contract; (2) Respondent's claim was

independent under state law, not subject to pre-emption; and (3) Respondent was not a party to the labor agreement, had no access under it, was not bound by it, thus her claim was not pre-empted.

IV. There is no conflict between the circuits on the question of whether a § 301 pre-emption defense is waivable. The Third Circuit case upon which petitioners rely as establishing a contrary holding is recognized as dicta; and the decisions of the Sixth and Seventh Circuit upon which they rely are distinguished on the facts, not on principles of law.

V. The ruling below that a § 301 pre-emption defense is waivable is consistent with this Court's decision in International Longshoremen's Association v. Davis; the reliance of the First Circuit

upon the distinction in Davis of choice-of-forum and choice-of-law pre-emption for purposes of distinguishing pre-emption under the NLRA from § 301 the LMRA is fully consistent with and does not undermine established labor policy.

REASONS FOR NOT GRANTING THE WRIT

I. THE NATIONAL LABOR POLICY FAVORING GRIEVANCE-ARBITRATION RESOLUTION OF LABOR DISPUTES IS NOT IMPLICATED, MUCH LESS THREATENED, BY THE FIRST CIRCUIT'S DECISION.

II. THIS CASE DOES NOT PRESENT THE ISSUE SOUGHT TO BE REVIEWED IN THE CLEAR AND UNEQUIVOCAL MANNER NECESSARY FOR CERTIORARI REVIEW.

III. THIS CASE IS NOT APPROPRIATE FOR CERTIORARI REVIEW AS THE JUDGMENT IS SUPPORTABLE ON ALTERNATIVE GROUNDS.

(1) The Claim Challenging Defendants' Conduct Was Not Pre-empted.

(2) Dolores Sweeney's Claim Was Independent Under State Law, Not Subject to Pre-emption.

(3) Dolores Sweeney's Claim Was Not Pre-empted Because She Was Not A Party to The Labor Agreement.

IV. THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON THE QUESTION OF WHETHER A § 301 PRE-EMPTION DEFENSE IS WAIVABLE.

V. THE RULING BELOW THAT A § 301 PRE-EMPTION DEFENSE IS WAIVABLE IS CONSISTENT WITH THIS COURT'S DECISION IN INTERNATIONAL LONGSHOREMEN'S ASSOCIATION V. DAVIS.

ARGUMENT

I. THE NATIONAL LABOR POLICY FAVORING GRIEVANCE-ARBITRATION RESOLUTION OF LABOR DISPUTES IS NOT IMPLICATED, MUCH LESS THREATENED, BY THE FIRST CIRCUIT'S DECISION.

The respondent is compelled at the outset to note that petitioners strive here to turn this case on its head. Their petition is replete with claims that the ruling below allows respondent to "sidestep" national labor policy embodied in § 301 respecting application of federal law and the use of bargained-for

grievance and arbitration procedures in the resolution of labor-management disputes (e.g., Pet. Cert. at 24, 47, 50). That is not so. The petitioners "do protest too much."

This record does not establish that § 301 applied to any, only to some, or preclusively to all the behavior of the petitioners, or at all to Dolores Sweeney's claim. (See Argument III).

More fundamentally, national labor policy favoring grievance-arbitration resolution of labor disputes is not at all threatened by the ruling below as petitioners would have this Court believe. This Court's jurisprudence under § 301 demonstrates its concern with shaping the federal common law so as to require appropriate utilization of the grievance-arbitration process. For exam-

ple, in Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-653 (1965), this Court held that a plaintiff could not, consistent with § 301, by-pass the grievance-arbitration procedure in order to pursue a state law claim for severance pay. This Court stated in Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220 (1985) (citing Maddox, 379 U.S. at 653), that "[a] rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness[.]"

The concerns underlying the decision in Mattox and its progeny are wholly inapposite to the case at bar. Even if the ruling below is left intact, as well it should be, the plaintiff who forgoes resort to the grievance-arbitration mechanism and elects to pursue state law

claims does so at the peril of having to overcome a properly asserted pre-emption defense.

Thus, "sidestepping" is not the issue. The true issue is the repeated failure by the petitioners to avail themselves properly of the numerous opportunities afforded by the established rules of procedure and trial practice to test the applicability of § 301 (e.g., discovery; motions to dismiss, for judgment on the pleadings, summary judgment, directed verdict).[4]

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[4]Petitioners' observe that in the removal context, § 301 pre-emption "overrides the 'well pleaded complaint' rule[,]" citing Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987). (Pet. Cert. at 50-51). This is yet another hurdle for the "sidestepping" plaintiff, and as petitioners recognize, it "discourage[s] artful pleading[.]" (Pet. Cert. at 51). It points more to the adequacy of existing controls than to the need for an absolute refuge from "unartful" defense.

These failures are not disputed here.[5]

If there is a sidestepping issue presented here, it is raised by the conduct of the petitioners, who, having forgone multiple opportunities to raise their pre-emption defense, and having done so only in the face of an adverse jury verdict, now seek to sidestep the rules of practice that govern litigation in the federal courts. That the concerns for federal pre-emption may coexist with the orderly resolution of disputes has already been recognized by a number of the members of this Court.

In International Longshoremen's Association v. Davis, 476 U.S. 380, 391 (1986), where this Court applied so-

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[5]See Pet. Cert. at 14 n.5.

called "Garmon" pre-emption"[6] as "jurisdictional", in the sense that a grant of exclusive adjudicatory power to one forum precluded waiver in other fora, four Justices disagreed, concerned that the decision afforded a wait-and-see option disruptive to judicial administration:

> By allowing a defendant to save its pre-emption claim until after it sees the verdict, this ruling poses a sufficient threat to orderly judicial proceedings that it can be justified only if Congress has mandated such a result. Because Congress clearly has not mandated any such result, I disagree with Part II of the Court's opinion.

Davis, supra, 476 U.S. at 399 (Rehnquist, J., concurring in part, joined by Powell, J., Stevens, J., O'Connor, J.).

> Here Alabama, by application of a neutral statute with a pre-

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[6]San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) (hereinafter "Garmon")

> cise counterpart in the Federal Rules of Civil Procedure, has said that a defendant who wishes to claim federal pre-emption as a defense to state-court exercise of jurisdiction may not wait to raise that claim until after the case has gone to verdict. The Court, saying otherwise, allows a sophisticated defendant as in the present case to gamble on obtaining a favorable verdict and raise a pre-emption defense only if it loses on the merits. To me this result defies common sense; if Congress had ordained it, I would reach it albeit with reluctance. But it is this Court, not Congress, that has ordained the result. I believe the Court is mistaken in doing so, and I therefore cannot join Part II of its opinion.

Id. at 402-03.

Westvaco was surely as sophisticated as Dolores Sweeney in labor matters.[7]

Accordingly, the decision that § 301 pre-emption is subject to waiver, is not

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[7]Westvaco "is a large corporation [that] committ[ed] significant resources to defending this case." App. A at 18a).

inconsistent with national labor policy, nor does it condone "sidestepping", as the petitioners argue as their Reason IV (Pet. Cert. at 39). The policy is intact; all one need do is properly invoke the pre-emption defense. Indeed, in appropriate cases, considering the strong policy supporting § 301 pre-emption, courts may even afford relief from failure to timely invoke pre-emption. See Apponi v. Sunshine Biscuits, Inc., supra, and National Metalcrafters, Div. of Keystone Consol. Indus. v. McNeil, supra.

What petitioners seek here, by claiming a right to their neglect under cover of "jurisdiction", is absolute dispensation from established, essentially equitable and understood rules of procedure and trial practice. They seek even to avoid the discretion of appellate

courts in deciding whether to reach issues not timely raised. The establishment of the rule sought by the petitioners - an absolute right to raise a § 301 pre-emption defense at any time, even after a jury verdict - is not necessary to discourage "sidestepping"; rather, the rule would encourage and reward dalliance, negligence, or worse, intentional manipulation of procedural and trial practice.

Unfairness

In addition to the unfairness discussed above, petitioners prejudiced Dolores Sweeney. Not only did the First Circuit state that "Westvaco had no good reason for its neglect" (App. A at 44a), it considered the "unfairness . . . obvious and aggravated here. . . . [where] Mrs. Sweeney might have tried to reshape

her case to avoid any need for contract interpretation had she know of the problem sooner." (App. A at 44a).

It is established that "substantive rights in labor relations can exists without interpreting collective-bargaining agreements." Lingle v. Norge Division of Magic Chef, 486 U.S. 399, 411 (1988). "[N]ot every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301. . . ." Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985). Both Lingle and Allis-Chalmers recognize considerable freedom for operation of the states' police power. Mrs. Sweeney may well have been able to de-emphasize or eliminate any aspect of her claim that may have impacted § 301, she may have developed further those

aspects of the defendants' behavior not impacted by § 301.[8] Certainly harassing, taunting, and humiliating behavior (App. A at 9a) offered such opportunities.

II. THIS CASE DOES NOT PRESENT THE ISSUE SOUGHT TO BE REVIEWED IN THE CLEAR AND UNEQUIVOCAL MANNER NECESSARY FOR CERTIORARI REVIEW.

Through the course of more than three years of litigation, including seven arduous days of jury trial, the petitioners and their counsel were content to view this matter as simply a tort case (App. A at 53a). The petitioners, now in

[8]Petitioners disparage, as condoning "artful pleading," the First Circuit's observation that Mrs. Sweeney may have "reshaped" her claim. (Pet. Cert. at 51-52, n.15). Petitioners' criticism is unjustified. Lingle and Allis-Chalmers contemplate legitimate claims within the labor context as displayed above (see text at 27), and "sidestepping" by "artful pleading" is already well subject to discovery, motions, and even removal (see footnote 4).

extremis, attempt in their "Statement of The Case" to cast this matter simply as a labor-management case, endeavoring to posture it as a simple and clean question respecting the pre-emptive reach of § 301. The underlying facts and the decision of the First Circuit belie this. As a matter of simple justice, it cannot be said that harassment, taunting, and humiliation, "behavior of unusual callousness or cruelty" (App. A at 9a), are rights of management under any labor agreement. Additionally, the First Circuit found it unnecessary to reach the question of whether § 301 actually applied to the circumstances of this case (App. A at 23a).

The First Circuit did not decide whether certain or any of the aspects of the conduct of the defendants required

interpretation of the labor agreement so as to trigger § 301 pre-emption in the first place; nor did the court decide whether Dolores Sweeney, whose claim was independent under state law of any claim of George Sweeney, who was not a party to the labor agreement, and who had no rights or recourse under it, was pre-empted by § 301.[9]

Thus, petitioners' representation that "[t]he instant case presents this Court with an opportunity to address directly the issue of whether an otherwise valid assertion of § 301 preemption may

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[9]These several issues were fully briefed before the First Circuit by Plaintiff-Appellant Dolores Sweeney: Interpretation of agreement not required, § 301 inapplicable (Pl. Br. 1st Cir. at 45-49); Dolores Sweeney's claim independent, not party to agreement, not pre-empted by § 301 (Pl. Br. 1st Cir. at 38-45), and argued here (Argument III) as providing alternative grounds to support the judgment below.

be waived by a party or raised at any time" is an overstatement of the record ("Pet. Cert." at 23) (emphasis added). A serious question of the appropriateness of this case for certiorari review on the issue posited by the petitioners is presented. It is not presented in the "clear and unequivocal manner which is so necessary for proper adjudication in this Court." Lear, Inc. v. Adkins, 395 U.S. 653, 675 (1969). The question is precariously presented at best.

III. THIS CASE IS NOT APPROPRIATE FOR CERTIORARI REVIEW AS THE JUDGMENT IS SUPPORTABLE ON ALTERNATIVE GROUNDS.

This Court refuses to grant a writ of certiorari where there are alternative grounds for finding that the judgment below is correct. See Colorado v. Nunez, 465 U.S. 324 (1984). The "precedents [of

this Court] establish that a prevailing party may urge any ground in support of the judgment, whether or not that ground was relied upon or even considered by the court below." United States v. Arthur Young & Co., 465 U.S. 805, 814, n.12 (1984); United States v. New York Telephone Co., 434 U.S. 159, 166, n. 8 (1977). There are at least three such grounds here.

(1) The Claim Challenging Defendants' Conduct Was Not Pre-empted.

A fair reading of the proofs before the jury will demonstrate that although the infliction of emotional distress aspect of the claim occurred in an employment context, interpretation of the labor agreement was not in dispute. Indeed, as in Lingle v. Norge Division of Magic Chef, 486 U.S. at 407, the "factual ques-

tions pertain[ed] to . . . the conduct and motivation[s] of the [defendants]." Manner of conduct, and motives of the supervisors were the issue, not rights under the contract to issue the warning, review safety, operate machines at production speed, or transfer George Sweeney to the tool crib.

The First Circuit found that George Sweeney was "harassed, taunted, and humiliated" (App. A at 8a), that the defendants behavior was of "unusual callousness or cruelty." (App. A at 9a). Such behavior cannot reasonably be within the rights of an employer under any contract. E.g., Keehr v. Consolidated Freightways of Delaware, Inc., 825 F.2d 133, 138-137 (7th Cir. 1987) (callousness, humiliation, insult, vexation certainly not pre-empted by § 301); Paradis v. United

Technologies, Pratt & Whitney Div., 672 F.Supp. 67, 71 (D. Conn. 1987) (harassment not pre-empted under § 301); Alpha Beta, Inc., v. Superior Court, 244 Cal.Rptr. 414 (Cal. App. 1st Dist. 1988) (personal abuse not pre-empted by § 301).

The First Circuit stated:

> The case in its present posture does not offer a specific interpretation of any word contained in the relevant collective bargaining agreement. Nor is there the slightest indication that any third party, any other worker, any union, any employer, is adversely affected by any collective bargaining agreement interpretation here at issue.

(App. A at 45a).

Thus, there was no occasion to interpret the contract.

(2) Dolores Sweeney's Claim Was Independent Under State Law, Not Subject to Pre-emption.

As the First Circuit found, at the time the cause of action arose a loss of consortium claim was independent under Massachusetts tort law of the claims of the other spouse (App. A at 10a). Feltch v. General Rental Co., 383 Mass. 603, 421 N.E.2d 67 (1981) (a plaintiff's recovery for loss of consortium is not to be reduced by the proportion of negligence attributable to the plaintiff's spouse under comparative negligence statute); Ferriter v. Daniel O'Connell's Sons, 381 Mass. 507, 413 N.E.2d 690 (1980) (workers compensation statute does not bar employee's spouse from suing the employer for loss of consortium due to injury of employee). Accordingly, Dolores Sweeney's claim was not pre-empted by § 301. See

Adkins v. General Motors Corp., 556 F.Supp. 452, 458 (S.D.Ohio 1983) (loss of consortium claim not pre-empted by § 301, "under Ohio law . . . a spouse [has] a separate and independent cause of action for loss of consortium.").[10]

(3) Dolores Sweeney Was Not A Party to The Labor Agreement, Had No Access Under It, Was Not Bound By It, Thus Her Claim Was Not Pre-empted.

The basic principle that one not a party to a contract is not bound by the terms of that contract (and has no recourse under it) applies in the application of § 301 pre-emption. While it may not be denied that a policy of consisten-

[10]The case of Johnson v. Anheuser-Busch, 876 F.2d 620 (8th Cir. 1989) relied on by the Magistrate (App. B at 45b) is inapposite, because under the state law there applicable, loss of consortium was a derivative claim arising out of the tort claims of the injured spouse.

cy underlies pre-emption law, it seems inappropriate, at best, to support consistency in interpretation of the "bargain" of the parties to the labor agreement on the backs of a stranger. Indeed, this is implicit in the otherwise express terms of the opinions of this Court. In Teamsters v. Lucas Flour Co., 369 U.S. 95, 104 (1962), the Court's concern was that "conflicting legal concepts might substantially impede the parties' willingness to agree to terms. . . ." (emphasis added). In Allis-Chalmers v. Lueck, 471 U.S. at 217, a tenet of the Court's holding was that "the parties . . . are free to bargain about what 'reasonable' performance of their contract obligation entails." (emphasis added). The Court was concerned in Allis-Chalmers v. Lueck, supra at 220, that "[a] rule that permit-

ted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness." (emphasis added).

The principle that a stranger to the contract has no rights under it, and is not precluded by it, has been implemented by this Court even in the preclusive context of so-called "Garmon" jurisdictional pre-emption. San Diego Building Trades Council v. Garmon, 359 U.S. 236. "We have recognized an exception for conduct that is arguably protected under § 7 where the injured party has no means of bringing the dispute before the Board." International Longshoremen's Association v. Davis, supra at 393, n.10 (citing Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978)). Obviously, Dolores

Sweeney had no means of pursuing a grievance or arbitration under the agreement.

"'[C]ourts have generally held that [§ 301] creates federal jurisdiction only over parties to the contract being sued upon.' Metropolitan Detroit Bricklayers v. J.E. Hoetger & Co., 672 F.2d 580, 583 (6th Cir.1982) (emphasis added)." Lee v. General Motors Corp., 684 F.Supp. 163, 165 (E.D.Mich. 1987). Accordingly, only those parties are pre-empted by its application. In Lee v. General Motors Corp. supra, the court held that a female employee's state law claims against her employer and a security guard were not pre-empted, because she lacked standing to sue under § 301, as she was neither a signatory to the collective bargaining agreement between employer and guard workers' union, nor was she a member of

that union, and she was not a third-party beneficiary of agreement. See also Adkins v. General Motors Corp., supra at 458 (loss of consortium claim not pre-empted under § 301 precisely because the consortium plaintiffs, wives of employees of the defendant, had no standing to sue under § 301).

IV. THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON THE QUESTION OF WHETHER A § 301 PRE-EMPTION DEFENSE IS WAIVABLE.

The First Circuit observed that in Johnson v. Armored Transport of California, Inc., 813 F.2d 1041, 1043-44 (9th Cir. 1987), the Ninth Circuit expressly held that a § 301 pre-emption defense is waivable and that the parties "do not posses an absolute right to raise it for the first time on appeal." (App. A at

37a). "Similarly", the court stated, the Sixth Circuit in Apponi v. Sunshine Biscuits, Inc., supra, and the Seventh Circuit in National Metalcrafters v. McNeil, supra, "have held that a defendant may raise a § 301 pre-emption argument for the first time on appeal in special circumstances,[11] thereby holding that the claim is not one that the parties have an absolute right to raise at any time." (App. A at 37a-38a) (emphasis in original).

Thus, the First Circuit concluded:

> [W]e agree with the Ninth Circuit and with what we take as the holding implicit in the approach of the Sixth and Seventh Circuits, namely, that in an appropriate case, a party can waive § 301 pre-emption; the parties do not have an absolute right to raise that ar-

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[11]These "special circumstances" are addressed hereinafter at page 42.

gument at any stage they wish in the proceedings.

(App. A at 42a).

As outlined in the Statement of the Case,[12] the First Circuit recognized as dicta, without analysis, the statement of the Third Circuit in Carpenters, supra at 469-70, that "if the issue of pre-emption were not jurisdictional, a strong case for waiver could be made on [the] facts." Nevertheless, petitioners offer this case as a "directly contrary holding" (Pet. Cert. at 17). The petitioners criticize the First Circuit, arguing that Carpenters was dictum only in a technical sense (Pet. Cert. at 26, n.9). But, dictum it remains. Moreover, the Third Circuit did not have the benefit of this Court's

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[12]See page 8 herein.

teaching in Davis. (See Argument V herein at page 47).

Accordingly, it does not appear that a substantial conflict, or indeed any conflict exists as to whether a § 301 pre-emption defense is waivable. Certainly, there is not "a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals" as to warrant certiorari review. Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923) quoted in Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 79 (1955).

In National Metalcrafters, supra, and Apponi, supra, "special circumstances" prevailed. (App. A at 37a).

The Seventh Circuit decision in National Metalcrafters was fact specific. First, the defendant actually argued pre-

emption in the district court, albeit without specific reference to § 301. National Metalcrafters, supra at 825. Thus, the very fact that in National Metalcrafters the defense of pre-emption was raised to the extent that it was is an important distinction. Second, the court held that the issue of § 301 pre-emption in the case was intertwined with Garmon pre-emption under § 8 of the National Labor Relations Act. Indeed, the court concluded that the "dispute over vacation pay is doubly preempted; by section 301 of the Taft-Hartly Act and by section 8 of the National Labor Relations Act." National Metalcrafters, supra at 828 (emphasis added). Finally, National Metalcrafters was a case of declaratory judgment, disposed of in the district court upon a motion to dismiss not in-

volving protracted litigation and a "long and painful" jury trial as in the instant case. (App. B at 46b).

The Sixth Circuit in Apponi characterized pre-emption under § 301 as an "affirmative defense", but "declined to apply the waiver rule." Id. at 1215 (citing National Metalcrafters, supra at 825-826). The action was for was for breach of contract by the defendant in refusing to pay early retirement benefits under a collectively-bargained pension plan. The trial judge submitted a single factual issue to the jury - whether during the negotiation of the plan the defendant had made particular parol representations affecting early retirement. The jury found that the defendant had.

On appeal to the Sixth Circuit, the defendant raised the defense of pre-

emption under § 301. The Sixth Circuit held that the claim was pre-empted, but preserved, "as binding upon the parties" the jury finding that the defendant had made the representations. Apponi, supra at 1220. The court ordered the district court, on remand, to "instruct the jury that the representations were made." Id. In Apponi, the alleged breach was squarely within a collectively-bargained agreement, indeed the dispute arose directly out of labor negotiations themselves. Id. at 1215. The plaintiffs could relitigate the same factual disputes. Moreover, the plaintiffs were not prejudiced by belated consideration of preemption, because a jury finding favorable to the plaintiffs and central to their case was preserved.

Thus, in all these particulars, National Metalcrafters and Apponi are dis-

tinguishable on the facts from the case at bar. The decision of the First Circuit not to "forgive and overlook" the defendants' failure to timely raise preemption (App. A at 42a; 46a), distinguished National Metalcrafters and Apponi on the facts - on a "host of special circumstances" (App. A at 43a) - not on principles of law. The court found that in the instant case "the circumstances simply do not call for an exception." (App. A at 44a). "[C]onflict in decisions aris[ing] from differences in states of fact, and not in the application of a principle of law" do not justify granting a writ of certiorari. Wisconsin Electric Co. v. Dunmore Co., 282 U.S. 813 (1930) (per curiam; dismissing writ as improvidently granted).

V. THE RULING BELOW THAT A § 301 PRE-EMPTION DEFENSE IS WAIVABLE IS CONSISTENT WITH THIS COURT'S DECISION IN INTERNATIONAL LONGSHOREMEN'S ASSOCIATION V. DAVIS.

This Court held in Davis that Garmon pre-emption was not waivable because Congress invested the NLRB with exclusive jurisdiction over claims under §§ 7 and 8 of the NLRA. Davis at 391. Petitioners attempt to gather from Davis that pre-emption under § 301 of the LMRA is not waivable. They argue, that as they had before the First Circuit, that for purposes of § 301 pre-emption, "the grievance and arbitration process under a collective bargaining agreement is . . . the analog" to exclusive forum jurisdiction under Garmon pre-emption. (Pet. Cert. at 36) (see App. A at 30a) The First Circuit's rejection of this argument dem-

onstrates clearly that the petitioners' reliance on Davis is fully misplaced.[13]

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[13]Petitioners argue, in support, that because this Court said in Caterpillar, supra at 393, that a complaint is viewed "from inception" as arising under federal law so as to constitute an exception to the "well pleaded complaint" rule, a state law claim may not be adjudicated even where a pre-emption or "arising under" argument is not made. (Pet. Cert. at 32-33) (see also footnote 4 herein). This certainly "overworks" Caterpillar, and is an attempt to resurface an argument made by the defendants (and rejected by the First Circuit), that, because in the removal context of § 301 "claims" courts have used the word jurisdiction, § 301 is "jurisdictional" in the sense that it cannot be waived (App. A at 38a-39a). The First Circuit stated: "But that is not what these cases hold." (App. A at 38a). The First Circuit recognized that while these cases employed the "protean word 'jurisdiction'" (App. A at 38a), they did not involve waiver (App. A at 39a). Rather, the court said, they "dealt with the question whether the district court had properly held that § 301 pre-empted the plaintiff's state-law claim, and whether there was a sufficient basis for 'arising under' jurisdiction after removal." (App. A at 39a). "[T]he term 'jurisdiction' . . . is a verbal coat of . . . many colors." Davis at 402 (Rehnquist, J., concurring, quoting Jus-

(continued...)

Among the elements of the court's analysis were that:

> the Supreme Court carefully limited its holding in Davis. It made clear that it was describing Congress's "jurisdictional" intent in respect to §§ 7 and 8 of the NLRA, not other statutes. . . . Moreover, the Court spoke of Congress's intent, in respect to pre-emption by §§ 7 and 8 of the NLRA, as involving "a choice-of-forum rather than a choice-of-law question." Davis, 476 U.S. at 391.

(App. A at 31a-32a) (citing Brown v. Trustees of Boston University, 891 F.2d 337, 363 (1st Cir. 1989), cert. denied, 110 S.Ct. 3217 (1990)).[14] The court

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[13](...continued)
tice Frankfurter in United States v. Tucker Truck Lines, Inc., 344 U.S. 33, 39 (1952)).

[14]In the last quoted passage, the First Circuit was referring to this Court's language in Davis at 391, that:

> when a state proceeding or regulation is claimed to be pre-
>
> (continued...)

continued, that this Court had warned in Davis at 391, n.9, that:

> our decision today does not apply to pre-emption claims generally but only to those pre-emption claims that go to the State's actual adjudicatory or regulatory power as opposed to the State's substantive laws.

The First Circuit concluded that "LMRA § 301 pre-emption (unlike NLRA §§ 7 & 8 pre-emption) concerns what law a decision maker must apply, not what forum must decide the dispute" (App. A at 36a).

The Ninth Circuit in Johnson, supra, had reached the same conclusion employing

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[14](...continued)
empted by the NLRA under Garmon, the issue is a choice-of forum rather than a choice-of-law question. As such, it is a question whether the State or the Board has jurisdiction over the dispute. If there is pre-emption under Garmon, then state jurisdiction is extinguished.

its prior interpretation in Gilchrist v. Jim Slemons Imports, Inc., 803 F.2d 1488 (9th Cir. 1986), of this Court's opinion in Davis. The Ninth Circuit stated that in Gilchrist "we analyzed the reasoning in Davis and extrapolated the following rule: 'a preemption argument that affects the choice of forum rather than the choice of law is not waivable; thus it can be raised for the first time on appeal.'" Johnson, supra at 1043 (quoting Gilchrist, supra at 1907).[15]

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[15]State and federal courts are uniform in their understanding of this teaching of Davis: E.g., Dueringer v. General American Life Ins. Co., 842 F.2d 127, 130 (5th Cir. 1988) (pre-emption involving "choice-of-law" is subject to waiver, citing Johnson, supra at 1043-44 and Gilchrist, supra at 1497 (9th Cir. 1986)); Castello v. Neely's TBA Dealer Supply, 776 S.W.2d 290 (Tex. Ct. App. 1989); Great North American Stationers v. Ball, 770 S.W.2d 631 (Tex. Ct. App. 1989) ("From the Court's conclusion [in Davis] we identify the following rule: a preemp-

(continued...)

In rejecting the defendants' analog argument that Congress intended grievance and arbitration as exclusive fora, the First Circuit reasoned, in part, that Congress could not have so intended in as much as Congress "does not require that collective bargaining agreements provide for grievance and arbitration" (App. A at 35a), and that it is abundantly clear that parties to a dispute "may waive the benefit of these procedures." (App. A at 35a).

In this the First Circuit seems clearly correct. In Litton Financial

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[15](...continued)
tion argument that affects the choice of forum rather than the choice of law is not subject to waiver; conversely, a pre-emption claim that affects only the law to be applied and not the court which may hear the dispute is waivable."); Hubred v. Control Data Corp., 442 N.W.2d 308 (Minn. 1989) (choice-of-law pre-emption waived).

Printing Division v. NLRB, 111 S.Ct.2215 (1991), this Court stated that it is "basic federal labor policy that 'arbitration is a matter of contract'", Litton at 2222 (quoting United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)); that "[n]o obligation to arbitrate a labor dispute arises solely by operation of law", Litton at 2222 (quoting Gateway Coal Co. v. Mine Workers, 414 U.S. 368, 374 (1974)); and "reaffirm[ed] . . . that under the NLRA arbitration is a matter of consent. . . ." Litton at 2222.

The First Circuit's distinction between choice-of-forum and choice-of-law pre-emption recognizes that choice-of-forum pre-emption in the labor law context, as this Court held in Davis, is integral to Congress's intention to have

the NLRB assume primary responsibility for developing federal labor laws under the NLRA. Through that mechanism, Congress provided for uniform outcome, on a national basis, of disputes arising under the NLRA.[16]

The choice-of-law issue implicated by this case is decidedly different. Almost by definition, there can be no interest in the uniform outcome of matters arising under collective bargaining agreements. To the contrary, each arbitrator is expected to interpret and apply

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[16]It bears repeating, however, that four members of the Davis Court disagreed that Congress intended in establishing the "jurisdiction" of the NLRB to "threat[en] orderly judicial proceeding" by precluding judicial waiver. Davis at 399 (Rehnquist, J., concurring, joined by Powell, J., Stevens, J., O'Connor, J.) (see text herein at page 22). They believed this to be a "perverse application" of "jurisdiction" by the Court. Id. at 402.

the agreement according to its specific language, viewed in light of the "common law of the shop." United Steel Workers of America v. Warrior & Gulf Navigation Co., supra at 582.[17] So viewed, the interest protected by choice-of-law pre-emption is to encourage the parties resort to the grievance-arbitration process. As has been demonstrated (Argument I herein), the ruling below does not threaten the integrity of that process. Therefore, the reliance of the First Circuit upon the distinction in Davis of choice-of-forum and choice-of-law pre-emption is

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[17]Indeed, there is no formal doctrine of stare decisis in labor arbitration. See generally F. Elkouri & E. Elkouri, How Arbitration Works 414-419 (4th ed. BNA 1985). Moreover, Given the relative informality of grievance and arbitration, and the multitude of arbitrators, there is no assurance of uniformity of outcome or interpretation even within the same agreement, much less from one agreement to another.

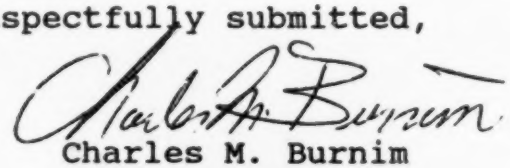
fully consistent with and does not undermine established labor policy.

CONCLUSION

Contrary to the representations made by the petitioners in their Conclusion, their petition does not involve any "question that has divided the circuits" with respect to whether a § 301 preemption defense is waivable; and given the numerous opportunities in the procedure and trial practice to test the applicability of § 301, it does not appear to be a recurring question - that many litigants find themselves in the posture of waiver as do the petitioners (Pet. Cert. at 52-53). Moreover, this petition does not present the question in a manner appropriate for certiorari review. The ruling of the First Circuit sought to be reviewed is fully consistent with both

federal labor policy and the need for orderly judicial proceedings. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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In the
Supreme Court of the United States

OCTOBER TERM, 1990

WESTVACO COMPANY, RICHARD LAFFARGUE
AND LORENZO SANCHEZ,
PETITIONERS,

v.

DOLORES SWEENEY,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY BRIEF

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STATUTES

Labor Management Relations Act,
§ 301, 29 U.S.C. § 185 passim

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1990

WESTVACO COMPANY, ET AL.,
PETITIONERS,

v.

DOLORES SWEENEY,
RESPONDENT.

I. THE ISSUE SOUGHT TO BE REVIEWED IS PRESENTED CLEARLY AND UNEQUIVOCALLY.

Respondent argues that this case is not worthy of certiorari because it "does not present the issue sought to be reviewed in the clear and unequivocal manner necessary for certiorari review." Resp. Brief in Opp. to Pet. for

Cert. at 27.[1] It requires only the briefest review of the decisions below to demonstrate that respondent's argument is wrong.

The single issue presented to this Court by the Petition is the question whether a preemption claim arising under § 301 of the Labor Management Relations Act is waivable. The District Court below specifically ruled that "normal rules of preservation do not apply," and thus concluded that a claim of § 301 preemption could not be waived. App. B. to Petn. at 17b-19b (emphasis in original). The District Court then went on to hold that the plaintiff's state law tort claim was preempted by § 301. Id. at 19b-47b. The Court of Appeals reversed on the waiver issue, holding that petitioners had waived the § 301

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[1] Hereinafter, citations to the Petition for Writ of Certiorari will appear as "Petn." followed by the page number. Citations to Respondent's Brief in Opposition to Petition for Certiorari will appear as "Resp." followed by the page number.

preemption defense by failing to assert it before the end of the trial. App. A to Petn. at 23a. In light of this ruling, the Court of Appeals decided that it did not need to address the issue of whether the tort claim was preempted.

Respondent seems to argue that the Court of Appeals' failure to address the § 301 preemption issue somehow prevents this Court from properly addressing the waiver issue. The waiver issue is the only issue that petitioners have brought before this Court. It is the only issue that has been adjudicated by both the District Court and the Court of Appeals. Respondent's assertion that this issue is "precariously presented," Resp. at 30, is incomprehensible.

II. THERE ARE NO "ALTERNATIVE GROUNDS" FOR UPHOLDING THE RULING BELOW WHICH WOULD JUSTIFY DENIAL OF THE PETITION.

Respondent maintains that certiorari should not be granted because there are "alternative grounds for finding that the judgment below is correct." Resp. at 30. Respondent then proceeds to argue, in effect, that assuming petitioners' § 301 preemption defense was not waivable, nonetheless respondent's tort claim was not preempted by § 301. Respondent's arguments were specifically rejected by the District Court. App. B to Petn. at 19b-47b. Although the Court of Appeals did not need to reach these arguments, it nevertheless acknowledged that under the principles set forth by this Court in Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988), courts of appeals "have held that tort actions similar to this one are pre-empted under § 301(a)." App. A to Petn. at 22a.

The issue presented by the petitioner is of national significance. It will determine the priority of the policies supporting the uniform application of collective bargaining agreements and arbitration, as against state tort claims based on workplace conduct that is governed by collective bargaining agreements. This squarely presented threshold issue cannot appropriately be avoided by considering, without extensive briefing and argument, substantive issues which were not reached by the Court of Appeals.

In any event, respondent is wrong in contending that preemption does not properly apply in this case.

A. The Underlying Claim for Negligent Infliction of Emotional Distress Requires an Interpretation of the Collective Bargaining Agreement and Is Therefore Preempted.

Respondent asserts that the Court of Appeals "found" that George Sweeney was "'harassed, taunted and humiliated' [and] that the defendants' behavior was of

'unusual callousness or cruelty.'" She argues that such behavior "cannot reasonably be within the rights of an employer under any contract." Resp. at 32. Thus, she argues, § 301 preemption does not apply to this case because interpretation of the contract was not in dispute. Resp. at 33.

But respondent's assertions are misleading. The Court of Appeals stated only that the jury might have found such behavior. App. A to Petn. at 6a. In fact, the jury returned a verdict of negligent infliction of emotional distress, and specifically rejected plaintiff's claim of intentional infliction, App. B to Petn. at 12b, thus indicating that, contrary to respondent's characterization, defendants' behavior was not "outrageous" and not beyond

any possible contractual rights of an employer.[2] As the District Court observed:

> The very first element of the plaintiff's cause of action, negligence, necessarily requires scrutiny of the reasonableness of defendants' conduct under the circumstances. As the First Circuit noted in the Jackson case [Jackson v. Liquid Carbonic Corp., 863 F.2d 111 (1st Cir. 1988)], assessment of the reasonableness of an employer's actions in the workplace almost inevitably demands some interpretation of the applicable rules of that workplace.

App. A. to Petn. at 42b. The tort claim in this case cannot survive preemption because the reasonableness of defendants' allegedly negligent conduct cannot be evaluated

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[2] In Massachusetts, outrageous conduct is an element of the tort of intentional infliction of emotional distress, which the jury here rejected, but it is not an element of negligent infliction. Payton v. Abbott Labs, 386 Mass. 540, 437 N.E. 2d 171 (1982). In a case of negligent infliction, the issue is whether the defendant's conduct was reasonable. Id.

except by reference to -- and construction of -- the terms of the collective bargaining agreement.

Because the only tort found by the jury was negligent infliction of emotional distress, respondent's reliance upon Keehr v. Consolidated Freightways of Delaware, Inc., 825 F. 2d 133 (7th Cir. 1987), Paradis v. United Technologies, Pratt & Whitney Div., 672 F. Supp. 67 (D. Conn. 1987), and Alpha Beta, Inc. v. Superior Court, 244 Cal. Rptr. 414 (Cal. App. 1st Dist.), cert. denied, 488 U.S. 956 (1988), is misplaced. Each of those cases dealt specifically with intentional infliction of emotional distress. Each court found the behavior of the defendants so outrageous as not to require reference to the collective bargaining agreement. Here, by contrast, the District Court found that the acts complained of could "only be viewed through the lens of the collective bargaining agreement." App. B to Petn. at 43b.

Even claims of intentional infliction of emotional distress have been held to be preempted by § 301 where they cannot be decided without reference to the collective bargaining agreement. See, e.g., Douglas v. American Information Technologies Corp., 877 F.2d 565 (7th Cir. 1989). The Douglas Court observed that "the parties' contractual obligations regarding the terms and conditions of the employment relationship need not be reduced to the words 'expressly recited in the agreement.'" Id. at 572 (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 214 (1985)). It noted the possibility, suggested in Allis-Chalmers, that the collective bargaining agreement created implied rights which might govern the alleged misconduct. Id. at 573.

In Jackson v. Liquid Carbonic Corp., 863 F.2d 111, 118 (1st Cir. 1988), cert. denied, 498 U.S. 1107 (1989), the court stated, in reviewing plaintiff's invasion of privacy

suit against his employer, ". . . [r]easonableness almost always requires investigation of the terms of the collective bargaining agreement." See also Truex v. Garrett Freightlines, Inc., 784 F.2d 1347 (9th Cir. 1985); Newberry v. Pacific Racing Ass'n., 854 F.2d 1142, 1149-50 (9th Cir. 1988); Shane v. Greyhound Lines, Inc., 868 F.2d 1057 (9th Cir. 1988); Harris v. Alumax Mill Products, Inc., 897 F.2d 400 (9th Cir.), cert. denied, 111 S.Ct 102 (1990); Johnson v. Beatrice Foods Co., 921 F.2d 1015 (10th Cir. 1990).

In the present case, it is equally clear that the defendants' conduct could be evaluated only by reference to the terms of the collective bargaining agreement. As the District Court observed:

> [T]he actions complained of by the plaintiff were submerged, at the time the actions were taken, in the complex of interrelationships in the workplace environment. The initial warning, for example, was issued pursuant to specific

> written guidelines. The significance of the alleged bad faith refusal to accept the medical certificate implicates the rules of the workplace. The conduct of the safety engineer, the supervisors' demands for greater speed and the plaintiff's husband's eventual demotion and transfer can only be viewed through the lens of the collective bargaining agreement.

App. B to Petn. at 42b-43b.

B. The Policies Underlying the § 301 Preemption Doctrine Require That Plaintiff's Loss of Consortium Claim Be Preempted.

Allowing Mrs. Sweeney's consortium claim to go forward while her husband's claim is preempted, on the theory that her claim is somehow "independent," or because she is not a party to the collective bargaining agreement, Resp. at 34-39, would circumvent the principle of uniform labor policy so clearly articulated in Teamsters Local v. Lucas Flour Co., 369 U.S. 95 (1962), Allis-Chalmers, supra, and Lingle, supra. In order for Mrs. Sweeney to succeed on her loss of consortium claim, she

must establish that the defendants negligently inflicted emotional distress upon her husband. The negligent infliction claim necessarily requires an evaluation of the reasonableness of defendants' conduct and is, as shown above, inextricably intertwined with the interpretation of the collective bargaining agreement. Permitting plaintiff's loss of consortium claim to proceed on the theory that it is "independent" under state law would allow plaintiff to claim as tortious the same conduct toward her husband that an arbitrator could determine to be reasonable and proper under the collective bargaining agreement.

If the federal labor policies underlying the § 301 preemption doctrine are to be given full force and effect, loss of consortium claims by family members of employees that depend on proof of the reasonableness of conduct in the workplace must be governed by the same preemption standards that apply to claims by the employees themselves.

The spouse's claim for loss of consortium necessarily will depend on proof of the underlying tort claim of the injured employee. If that underlying tort claim requires consideration of the applicable collective bargaining agreement, the potential for state law interference with federal labor policy is the same in the loss of consortium case as it would be in a direct claim by the injured employee.[3] Were the rule otherwise, the preemptive effect of § 301, and the "interests in interpretive uniformity and predictability that require that labor contract disputes be resolved by reference to federal law," Allis-Chalmers, supra, 471 U.S. at 211, could routinely be evaded by suits filed by employees' relatives.

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[3] In fact, the potential for disruption is even greater, for it raises the specter of a single agreement having different meanings or consequences not only across state lines, but within the same state with regard to different members of the same household.

It is not surprising that the case law supports this view. In Johnson v. Anheuser-Busch, Inc., 876 F.2d 620 (8th Cir. 1989), the Court of Appeals for the Eighth Circuit held preempted under § 301 a loss of consortium claim that was dependent for its proof upon an underlying claim that required the interpretation of the labor contract. Id. at 624. The Johnson court, relying upon Allis-Chalmers, supra, concluded that to the extent that the wife's loss of consortium claim relied upon an underlying claim that was preempted under § 301, her loss of consortium claim was also preempted. Id. at 625. Under Johnson, a loss of consortium claim is subject to the same test under Allis-Chalmers as the underlying claim. Cf. Sluder v. United Mine Workers, 892 F.2d 549 (7th Cir. 1989), cert. denied, 111 S.Ct. 45 (1990). District Court cases have similarly acknowledged that spousal consortium claims cannot proceed to determination under state law

where they depend on the interpretation of a collective bargaining agreement. See, e.g., Ward v. Savannah Maritime Ass'n, 129 L.R.R.M. (BNA) 3061 (S.D. Ga. 1988); Sherwin v. Indianapolis Colts, Inc., 752 F. Supp. 1172 (N.D.N.Y. 1990).

Respondent's argument, based upon Adkins v. General Motors Corp., 556 F. Supp. 452 (S.D. Ohio 1983), that her "independent" loss of consortium claim may proceed notwithstanding § 301 because she would have no standing to sue under § 301, does not withstand scrutiny. As the District Court in the present case stated, Adkins "is simply not good law on this point." App. B to Petn. at 45b. Adkins predated this Court's decisions in Allis-Chalmers and Lingle. In holding that plaintiff's loss of consortium claim was not preempted, moreover, Adkins did not consider § 301 preemption, but only Garmon preemption. The court in Adkins did not consider whether

the loss of consortium claim required an interpretation of the labor-management contract.

Respondent also argues that § 301 should have no effect on her loss of consortium claim because it is "independent" of her husband's claim under Massachusetts law. Resp. at 34. This argument not only is based on the untenable premise that Massachusetts law should override federal labor policy, but it also misstates Massachusetts law on the loss of consortium. While the Massachusetts Supreme Judicial Court has described a loss of consortium claim as "independent" of the injured family member's claims for certain purposes, e.g., Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (1980), the Court has made clear that spousal consortium claims cannot go forward when the underlying tort claim is precluded. Thus, for example, in Corrigan v. General Electric Co., 406 Mass. 478, 548 N.E.2d 1238 (1985), the

Court held that a spouse's consortium claim was precluded by an adverse determination against her husband by the Industrial Accident Board, even though the spouse was not and could not be a participant in the IAB proceeding. See also Fidler v. E.M. Parker Company, Inc., 394 Mass. 534, 476 N.E.2d 595 (1985); Mouradian v. General Electric Co., 23 Mass. App. Ct. 538, 503 N.E. 2d 1318, rev. denied, 399 Mass. 1105, 507 N.E. 2d 1056 (1987) (wife's consortium claim dismissed where husband failed to state tort claim for wrongful discharge). These decisions undermine respondents' argument based on the "independence" of her consortium claim. Any such argument must, in any event, bow to the overriding force of federal labor law.

CONCLUSION

The single issue presented to this Court for review - whether a § 301 preemption claim is waivable - is clearly

and unambiguously presented by this case. Respondent's "alternative grounds" for upholding the judgment were squarely rejected by the District Court, were not reached by the Court of Appeals, and, in any event, involve legal arguments that are unlikely to succeed.

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